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IN THE

Supreme Court of the United States

October Term, 1984

UNIVERSITY OF PITTSBURGH, WESLEY W. POSVAR, PAUL N. ROBINSON, RHOTEN A. SMITH, DONALD N. HENDERSON, ROBERT NOSSEN,

Petitioners,

v.

HARRY T. KRYNICKY, JR.,

Respondent.

TEMPLE UNIVERSITY,

Petitioner,

v.

ROSEMARY SCHIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Where it is conceded that the Commonwealth of Pennsylvania did not encourage, coerce, participate in or receive a financial benefit from the challenged personnel actions of two private universities, the University of Pittsburgh and Temple University, does the holding of the Court of Appeals for the Third Circuit—that such actions were nevertheless made under color of state law, and are therefore actionable under 42 U.S.C. § 1983, because of a "symbiotic relationship" between those institutions and the Commonwealth—conflict with *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), *Polk County v. Dodson*, 454 U.S. 312 (1981), *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), as well as decisions of other Courts of Appeals and district courts?

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OPINIONS BELOW

Petitioners are the University of Pittsburgh ("Pitt") and Temple University ("Temple"), private, non-profit institutions of higher education which receive some state aid. This Petition arises out of the decision of the Court of Appeals for the Third Circuit in the consolidated cases of *Krynicky v. University of Pittsburgh* ("*Krynicky*") and *Schier v. Temple University* ("*Schier*"). The opinion of the Court of Appeals, reported at 742 F.2d 94, appears in Appendix A hereto.

The opinion of the United States District Court for the Western District of Pennsylvania in *Krynicky* is reported at 563 F. Supp. 788 and appears in Appendix B hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania in *Schier* is reported at 576 F. Supp. 1569 and appears in Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1984. Petitioners requested rehearing en banc, which was denied on September 24, 1984. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. § 1983

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State

or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This Petition is filed by two of the largest universities in the Commonwealth of Pennsylvania.[1] Pitt and Temple are private, non-profit corporations which receive some state aid. The issue presented by this Petition is whether the Court of Appeals correctly held that *all* of Pitt's and Temple's actions are "under color of" state law.

The plaintiffs in *Krynicky* and *Schier* brought actions under 42 U.S.C. § 1983, claiming that certain personnel practices of Pitt and Temple, respectively, were under color of state law and violated their federal constitutional rights. Although it was undisputed that the Commonwealth of Pennsylvania did not coerce, encourage, participate in or receive a financial benefit from the challenged acts, the Court of Appeals, relying on an expansive reading of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), found that Pitt and Temple acted under color of state law because of a "symbiotic relationship" between them and the Commonwealth.

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1. Pitt has an enrollment of approximately 27,000 students, its annual budget is approximately $345 million and it employs approximately 8,000 people. Temple's enrollment is over 30,000, its budget is nearly $400 million and it employs over 8,000 people.

Krynicky is a tenure denial case. The plaintiff, a former assistant professor of English, alleged that Pitt and various administrators violated his constitutional rights by denying him a tenured faculty position[2]. After the completion of discovery, Pitt moved for summary judgment on Krynicky's First Amendment claim under § 1983 on the basis that, in denying tenure, it did not act under color of state law for purposes of § 1983. The district court granted the motion under the authority of *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982), finding that the Commonwealth of Pennsylvania exercised no control over the personnel and tenure policies of Pitt. *Krynicky*, 563 F. Supp. at 788 (Appendix B at 2b).

In so holding, the district court in *Krynicky* addressed the vitality of *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (en banc). *Braden* was an earlier faculty employment decision which adopted a broad reading of *Burton's* "symbiotic relationship" test and affirmed the denial of Pitt's motion to dismiss based on lack of state action. In *Krynicky*, the district court held that "the standards employed in the *Braden* case to determine state action are not the present controlling law" and noted that in *Braden* "the district court and the Court of Appeals found that the state had exercised no control over the specific personnel policies which were the source of the plaintiff's complaint." *Krynicky*, 563 F. Supp. at 789 (Appendix B at 3b).

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2. "Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." *Blum*, 457 U.S. at 1003.

The plaintiff in *Schier* was an employee of Temple University Hospital. She claimed that her constitutional rights were violated by acts of sex discrimination. The district court denied Temple's motion for summary judgment on the § 1983 claim and concluded that "[w]hatever the shrinkage may be of the authority of *Burton*, . . . the relationship between Temple University and the Commonwealth of Pennsylvania more than satisfies the demands of *Burton* for a 'symbiotic relationship'." *Schier*, 576 F. Supp. at 1577 (Appendix C at 18c). The district court certified for interlocutory appeal that portion of its order which held that Temple's actions were under color of state law and the Court of Appeals agreed to hear the appeal.

Both plaintiffs conceded in the district courts and the Court of Appeals that there was no nexus between the Commonwealth and the challenged personnel decisions. Indeed, the record in *Krynicky* contained the following undisputed facts: (1) the Commonwealth does not regulate, control, influence or otherwise affect tenure decisions or the personnel policies or practices of Pitt; (2) the decision whereby a faculty member is granted or denied tenure is made solely by faculty members and administrators of Pitt and is based on their professional and academic judgment pursuant to internal Pitt guidelines and procedures which are neither compelled nor influenced by any regulation of the Commonwealth; and (3) all of the individuals involved in the deliberations concerning Krynicky's tenure prospects were full-time faculty members and/or administrators of Pitt who were neither employees of, nor in any way controlled, influenced or otherwise affected by, the Commonwealth.

Likewise, the undisputed facts in *Schier* showed the complete absence of Commonwealth involvement in the

personnel acts and policies at issue. Plaintiff's supervisor, to whom plaintiff attributed the allegedly discriminatory conduct, was a salaried employee of Temple and was not employed or paid by the State. The Commonwealth played no role in the development or administration of policies regarding personnel, hiring, promotion, firing and conditions of employment at Temple. No Commonwealth official was involved in any act or decision concerning the plaintiff's employment at Temple.

The Court of Appeals reversed in *Krynicky* and affirmed in *Schier.* It held that it was "bound" by *Burton* and *Braden* to find that a "symbiotic relationship" exists between the Commonwealth of Pennsylvania on the one hand and Pitt and Temple on the other. 742 F.2d at 103 (Appendix A at 20a). In reaching its decision, the court relied upon the general fiscal and regulatory relationship between Petitioners and the Commonwealth of Pennsylvania, as set forth by statute. 742 F.2d at 101-03 (Appendix A at 15a-19a).[3]

Pitt and Temple were chartered as non-profit corporations for educational purposes in 1787 and 1888, respectively. In 1965 and 1966 the Temple and Pitt Acts were enacted, providing that Petitioners each "shall continue as . . . corporation[s] for the same purposes as, and with all rights and privileges heretofore granted. . . ." 24 P.S. §§ 2510-3 (Temple), -203 (Pitt) (Appendix F at 2f-3f; Appendix G at 2g-3g). To confirm Petitioners' private identity and autonomy, the Acts explicitly provide

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3. Temple University—Commonwealth Act, Act of November 30, 1965, P.L. 843, § 1, 24 P.S. §§ 2510-1, *et seq.* ("Temple Act"); University of Pittsburgh—Commonwealth Act, Act of July 28, 1966, P.L. 87, § 1, 24 P.S. §§ 2510-201, *et seq.* ("Pitt Act"). The Temple Act and the Pitt Act are set forth *infra* as Appendix F and Appendix G, respectively. As noted by the Court of Appeals, these statutes are "virtually identical." 742 F.2d at 99 (Appendix A at 9a).

that the board of trustees of each institution retains the *entire* management and control over the university's educational, financial and administrative affairs. 24 P.S. §§ 2510-5 (Temple), -205 (Pitt) (Appendix F at 4f; Appendix G at 4g).[4]

Despite these provisions, the Court of Appeals noted that the statutes were enacted to save the Commonwealth the expense of creating additional state colleges, that the names of Pitt and Temple were changed to include the language "Of the Commonwealth System of Higher Education" and that Pitt and Temple are referred to as "instrumentalities" of the Commonwealth and as "State-related" universities. 742 F.2d at 101-02 (Appendix A at 15a-16a). The Court of Appeals also relied upon the "nuts and bolts" of the relationship, *i.e.*, that one-third of Petitioners' trustees are selected by Commonwealth officials, that the Commonwealth makes annual appropriations to each institution, that the Commonwealth may set tuition and fee schedules, that certain fiscal and activity reports must be filed with the Commonwealth, and that Pitt and Temple benefit from Com-

4. The Court of Appeals, in an earlier decision, and the Supreme Court of Pennsylvania held that Temple is a private institution under the Act. *Philadelphia National Bank v. United States*, 666 F.2d 834, 835 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) (referring to Temple as "a private non-profit corporation" and holding that interest on loans to Temple was not tax-exempt because Temple was not a political subdivision of Pennsylvania and had not "acted on behalf of" Pennsylvania); *see also International Union, United Plant Guard Workers of America v. Commonwealth*, 76 Pa. Commw. 150, 463 A.2d 496, 498 (1983), *aff'd mem.*, ___ Pa ___, 475 A.2d 739 (1984) (Pitt was not a public employer for purposes of state labor law); *Mooney v. Board of Trustees of Temple*, 448 Pa. 424, 430, 292 A.2d 395, 399 (1972) (there was "an express legislative intent to preserve Temple's status as a non-profit corporation chartered for educational purposes" and, therefore, Temple was not a state "agency" for purposes of another state statute).

monwealth capital development programs and a state tax exemption. 742 F.2d at 102 (Appendix A at 16a-17a).

Based solely upon these statutory provisions, the Court of Appeals—without addressing the fact that there was no state involvement in the particular challenged acts—concluded that there was a "symbiotic relationship" between the Commonwealth and the universities. *Rendell-Baker* and *Blum* were found inapposite because, according to the Court of Appeals, "the financial relationship was the only significant form of state influence over the defendants in those cases." 742 F.2d at 101 (Appendix A at 14a). The Court of Appeals also concluded that its expansive application of the "symbiotic relationship" test in *Braden* was not affected by *Rendell-Baker* and *Blum*. 742 F.2d at 103 (Appendix A at 19a). The Court of Appeals therefore held that *all* of Pitt's and Temple's actions are under color of state law.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves issues of substantial importance concerning the liability of private, albeit state-aided, institutions under § 1983 for alleged constitutional violations in their academic or personnel practices. The decision of the Court of Appeals, which permits § 1983 actions against Pitt and Temple without regard to the nature of the challenged activity, is in direct conflict with the decisions of this Court and the First, Fourth, Eighth and Tenth Circuits on these issues.

The questions presented by this petition are of far-reaching importance not only to Pitt and Temple, but also to numerous other entities which bear some regula-

tory or fiscal relationship to the state. For example, in recent years, in addition to Pitt and Temple, such private institutions as Harvard College, Syracuse University, Loyola University, Villanova University, Columbia University, Johns Hopkins University, New York University and Boston College have been sued under § 1983.[5] Under the guise of constitutional deprivations, these institutions have been sued for such diverse actions as tenure denial and faculty appointments (*Weise, Blouin, Gilinsky, Lorentzen*), awarding of grades (*Rice*), termination of employment in a work-study program (*Murphy*), admissions (*Stewart*), and denial of unemployment compensation benefits (*Greene*).

This Petition also involves considerations of important public concern. The significance of the state action requirement was discussed by this Court in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982):

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and

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5. *See Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Blouin v. Loyola University*, 506 F.2d 20 (5th Cir. 1975); *Murphy v. Villanova University*, 547 F. Supp. 512 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1402 (3d Cir. 1983); *Gilinsky v. Columbia University*, 488 F. Supp. 1309 (1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981); *Greene v. Johns Hopkins University*, 469 F. Supp. 187 (D. Md. 1979); *Stewart v. New York University*, 430 F. Supp. 1305 (S.D.N.Y. 1976); *Lorentzen v. Boston College*, 440 F. Supp. 464 (D. Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1981), *cert. denied*, 440 U.S. 924 (1979).

private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Id.* at 936-37.

The Court of Appeals relied on the statutory relationship of the State to Pitt and Temple, stating that "[t]his fact, above all, marks the difference between these two institutions and those discussed by the Supreme Court in *Rendell-Baker* and *Blum.*" 742 F.2d at 102 (Appendix A at 18a). That rationale, if followed, would transform *all* the decisions of entities whose governmental relationship is set forth by statute into government action. For example, federal action would be present in all decisions of the Communications Satellite Corporation, or the National Rail Passenger Corporation.[6]

If the decision below is permitted to stand, and the faulty analysis employed by the Court of Appeals is followed by other courts, many private state-aided entities, or entities mentioned in state or federal statutes, will be subject to suit under § 1983 or the Constitution by virtue of their overall statutory or regulatory relationship with the government, irrespective of whether the government coerced or significantly encouraged the challenged conduct. This result would be contrary to the purposes of § 1983 and the Constitution, in conflict with decisions of this Court and other Circuits, and would further burden the federal courts with actions alleging violations of constitutional rights.

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6. *But see Marcucci v. National Railroad Passenger Corp.*, 589 F. Supp. 725 (N.D. Ill. 1984) (and cases cited therein), holding decisions of AMTRAK not automatically attributable to the federal government because of the statutory relationship of AMTRAK to the government. Those district court decisions conflict with the decision of the Court of Appeals here.

I. The Holding Of The Court Of Appeals That The Challenged Acts Of Pitt And Temple Were Under Color Of State Law Conflicts With This Court's Decisions In *Blum v. Yaretsky*, *Rendell-Baker v. Kohn*, *Polk County v. Dodson* And *Jackson v. Metropolitan Edison Co.*

A person acts under color of state law only when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941), *quoted in Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981). The "ultimate issue" in determining whether state action exists is whether the alleged infringement of federal rights is "fairly attributable to the State." *Lugar*, 457 U.S. at 937.

As held by this Court, to establish state action, "[t]he complaining party must . . . show that 'there is a sufficiently close nexus *between the State and the challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' " *Blum*, 457 U.S. at 1004 (emphasis supplied), *quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). "[A] State normally can be held responsible for a private decision *only* when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the State." *Rendell-Baker*, 457 U.S. at 840, *quoting Blum*, 457 U.S. at 1004 (emphasis supplied).

Contrary to these standards, the Court of Appeals ignored the total lack of Commonwealth involvement in the challenged acts of Pitt and Temple and instead relied upon the overall fiscal and regulatory relationship between the Commonwealth and Petitioners in finding a

symbiotic relationship under *Burton*. The Court of Appeals rejected the contention that under this Court's recent holdings, notably *Blum* and *Rendell-Baker*, the symbiotic relationship test was inapplicable to the particular acts challenged by plaintiffs. The Court of Appeals ignored the holding of *Polk County* altogether.

In *Rendell-Baker*, six teachers discharged by the New Perspectives School brought suit under § 1983. The school specialized in dealing with "problem" high school students, nearly all of whom were referred to the school by public authorities, pursuant to statute. Public funds accounted for 90 to 99 percent of the school's operating budget. To be eligible for tuition funding under the state statute, the school was required to comply with a variety of government regulations, covering "almost every aspect" of the school's operations. *Rendell-Baker*, 457 U.S. at 846 (Marshall, J., dissenting). These regulations even included personnel regulations such as maintaining written job descriptions and written statements describing personnel standards and procedures. In addition, the state had to approve the school's hiring decisions on all vocational counselors.

Despite the extensive public funding and state regulation of the school in *Rendell-Baker*, this Court held that the personnel decisions at issue were not made under color of state law. In so holding, this Court analyzed the degree of the state's involvement in the challenged personnel decisions, rather than evaluating the overall relationship between the state and the New Perspectives School: "Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters."

Rendell-Baker, 457 U.S. at 841; *see also Id.* at 844 (White, J., concurring) ("For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State.").

In rejecting the argument that a symbiotic relationship existed between the state and the school in *Rendell-Baker*, this Court distinguished *Burton* as follows:

> "[P]etitioners argue that there is a 'symbiotic relationship' between the school and the State similar to the relationship involved in *Burton*. . . . Such a claim was rejected in *Blum v. Yaretsky*, and we reject it here. In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. 365 U.S., at 723. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions." *Rendell-Baker*, 457 U.S. at 842-43.

In *Blum*, this Court found an absence of state action in transfers by nursing homes of Medicaid patients to other facilities. State action was alleged to exist because the home was acting pursuant to state regulations when it transferred the patients; the state provided medical expenses for over 90 percent of the home's residents; and the state licensed the home.

This Court held that these facts did not amount to state action. First, under *Jackson*, the extensive state regulation of the nursing home did not lead to a finding of state action, since it was necessary to show that there was a nexus between the state and the transfer of the patients. *Blum*, 457 U.S. at 1004. In determining that this showing was not made, this Court, as in *Rendell-Baker*, pointed to the fact that the regulations, while extensive, did not govern the nursing homes' decisions to discharge or transfer particular patients: "Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. Second, this Court rejected the contention that the decision to transfer the patients was in effect a decision by the state, ruling that "a State normally can be held responsible for a private decision only where it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the State." *Id.* at 1004.

As in *Rendell-Baker*, this Court in *Blum* read *Burton* narrowly and, relying on *Jackson*, found the symbiotic test inapplicable: "As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Id.* at 1011.

In *Polk County*, this Court held that a public defender was not acting under color of state law in representing an indigent criminal defendant despite arguments that the public defender's office was created by state statute and the public defender was a state employee, appointed by the state to represent the criminal defendant, working in an office fully funded and ex-

tensively regulated by the state, and acting to fulfill a state obligation. This Court expressly held that *Burton* was inapplicable. 454 U.S. at 322 n. 12.

The Court of Appeals in the present case declined to acknowledge the impact of *Blum*, *Rendell-Baker* and *Polk County* on its state action analysis, and misconstrued the continuing vitality of its expansive reading of *Burton*.[7]

In finding that the symbiotic relationship test was satisfied, the Court of Appeals erred in distinguishing the present case from *Blum* and *Rendell-Baker* on the grounds that "the financial relationship was the only significant form of state influence over the defendants in those cases" and that there was only a "relatively minimal interrelationship between the State and the defendants in *Blum* and *Rendell-Baker*." 742 F.2d at 101 (Appendix A at 14a-15a). On the contrary, the school in

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7. It is questionable whether *Burton ever* had the precedential value that the Court of Appeals ascribed to it in *Braden* and the present case. Justice Clark expressly limited the majority's holding in *Burton* to a lease by a state "in the manner and for the purpose shown to have been the case here". *Burton*, 365 U.S. at 726. *See* Leedes, *State Action Limitations on Courts and Congressional Power*, 60 N.C.L. Rev. 747, 763 (1982) (*Burton* "has been limited closely to its facts, and for good reason"); Lewis, *Burton v. Wilmington Parking Authority-A Case Without Precedent*, 61 Colum. L. Rev. 1458, 1462 (1961) ("It would be futile, indeed it would completely disregard the Court's admonition, to attempt to state the principle of law that emerges from or governs this case."). Even before *Blum* and *Rendell-Baker*, the Third Circuit's expansive interpretation of *Burton* in its *Braden* decision was subject to strong scholarly criticism. Comment, *Constitutional Law—State Action—Hiring and Promotion Practices of Private University Receiving Public Funds Held State Action—Braden v. University of Pittsburgh*, 52 N.Y.U. L. Rev. 1401, 1423-27 (1977).

Rendell-Baker was required to comply with extensive government regulations, including regulations dealing with personnel standards and procedures and the state committee had to approve the school's hiring decisions of vocational counselors. *See Rendell-Baker*, 457 U.S. at 841 (referring to "extensive regulation of the school"). The nursing home in *Blum* acted pursuant to state regulations when it transferred patients and was licensed by the state. Thus, *Blum* held that "privately owned enterprises . . ., *even though they are extensively regulated*, do not fall within the ambit of *Burton*." 457 U.S. at 1011 (emphasis supplied).

The Court of Appeals also erred in relying on the fact that, unlike the institutions in *Rendell-Baker* and *Blum*, Pitt and Temple have a statutory relationship with the State. The existence of a statutory relationship does not transform the independent decisions of Pitt and Temple into actions of the State, as *Polk County* makes clear. *See* 454 U.S. at 318-19, 321-22 (holding that the independent legal representation decisions of the Public Defender are not under color of state law, even though his office is created by state legislation); *accord Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983); *Marcucci v. National Railroad Passenger Corp.*, *supra*.

The Court of Appeals compounded this error by reading into the Pitt and Temple statutes an "affirmative state act of statutorily accepting responsibility for these institutions." 742 F.2d at 102 (Appendix A at 18a). The statutes set forth the contrary. They explicitly provide for the retention of Petitioners' private corporate identity and autonomy, and state that the *entire* management, control and financial affairs is vested in the board of trustees. 24 P.S. §§ 2510-3, -5 (Temple), -203, -205

(Pitt). (Appendix F at 2f-4f; Appendix G at 2g-4g). The Pennsylvania state courts have consistently construed the Pitt and Temple Acts as providing that the universities remain privately owned and privately governed institutions. *International Union, United Plant Guard Workers of America v. Commonwealth, supra; Mooney v. Board of Trustees of Temple, supra.*[8]

Finally, the Court of Appeals pointed to no provision in the Pitt and Temple Acts—and there is no such provision—which purports to give the State any power to coerce or substantially influence personnel decisions of the universities. Where, as here, the complete autonomy of private institutions is preserved by statute, their decisions cannot be "fairly attributable to the State." *Lugar*, 457 U.S. at 937.

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8. The Court of Appeals' reliance upon the fact that one-third of Pitt's and Temple's trustees are selected by the Commonwealth, 742 F.2d at 103 (Appendix A at 18a), was misplaced. First, as was found in *Braden*, the trustees appointed by the Commonwealth have never acted in a bloc. 552 F.2d at 968 (Garth, J., concurring). Second, once trustees have been appointed, their obligations and duties are owed to the trust and its beneficiaries, and not the person who appointed them. *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 330 (1981). *See also Polk County*, 454 U.S. at 318-19, 321-22. *Accord* 15 P.S. § 7734 (directors of Pennsylvania non-profit corporations owe fiduciary duty to corporation).

It is not uncommon for private corporations to be chartered by a statute or to have government-appointed trustees on their boards. *See, e.g.*, 47 U.S.C. §§ 731, *et seq.* (Communications Satellite Corporation); 45 U.S.C. §§ 541, *et seq.* (National Railroad Passenger Corporation); *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976) (library); *Broderick v. Associated Hospital Service of Philadelphia*, 536 F.2d 1 (3d Cir. 1976) (Blue Cross).

For the above reasons, the Court of Appeals' holding that Pitt's and Temple's employment decisions were made under color of state law is in conflict with *Blum*, *Rendell-Baker*, *Polk County* and *Jackson*.

II. The Decision Below That The Symbiotic Relationship Test May Furnish A Basis For State Action—Whether Or Not The State Receives A Financial Benefit From The Challenged Activity—Conflicts With Decisions By The First, Fourth, Eighth and Tenth Circuits.

Whatever the correct application of the symbiotic relationship test was prior to *Blum*, *Rendell-Baker* and *Polk County*, those cases demonstrate that state funding and regulation such as that relied upon by the Court of Appeals in *Krynicky* and *Schier* cannot now support a finding of state action. Although the Court of Appeals expressly held to the contrary, a necessary element of the symbiotic relationship analysis is the requirement that the state financially benefit from the challenged activity, as was the case in *Burton*.

This limitation on *Burton*, which was set forth in *Rendell-Baker*, 457 U.S. at 842-43, and by implication in *Blum*, has been expressly recognized by three other Courts of Appeals. *Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399, 402 (4th Cir. 1984) ("Since plaintiffs did not show that the state profited from the termination of plaintiffs' employment, no 'symbiotic relationship' exists."); *Gomez v. North Dakota Rural Development Corp.*, 704 F.2d 1056, 1059 (8th Cir. 1983) ("[T]he Supreme Court precedents preclude finding a symbiotic relationship between the NDRDC and the federal government. A symbiotic relationship exists when the government profits from the allegedly unconstitutional conduct."); *Gerena v. Puerto Rico Legal Services, Inc.*, 697

F.2d 447, 451 (1st Cir. 1983) (funding and regulatory relationship between defendant and government did not create a symbiotic relationship in absence of showing that the government financially benefited from the challenged activity).

The decision of the Court of Appeals in this case also conflicts with the holdings of the Tenth Circuit in *Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306 (10th Cir. 1983) and the Fourth Circuit in *Arlosoroff v. National Collegiate Athletic Association*, No. 83-1702, slip op. (4th Cir. October 25, 1984). In *Loh-Seng Yo*, the Tenth Circuit correctly ruled that certain employment actions taken by a hospital were not under color of state law:

> "In this case, plaintiff bases his allegation of state action solely on receipt of governmental funds, extensive governmental regulation, and a localized geographic monopoly enjoyed by the hospital. However, he makes no allegation that these facts involved the state in any significant manner in the *specific conduct* of which he complains. Accordingly, plaintiff has failed to establish state action sufficient to invoke the jurisdiction of this court." *Id.* at 308 (emphasis in original).

In *Arlosoroff* the Fourth Circuit held that the National Collegiate Athletic Association, an organization of nearly one thousand colleges and universities, did not engage in state action when it enforced an eligibility rule against a university student:

> "It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action." slip op. at 3-4.

In the present case, the Court of Appeals ignored the undisputed fact that the Commonwealth of Pennsylvania was not involved in the specific conduct of which Krynicky or Schier is complaining.

Various district courts also conflict with the Court of Appeals' expansive application of *Burton* and expressly recognize that *Burton* is limited to situations where the state derives a financial benefit from the challenged activity.[9]

These conflicts—which are irreconcilable and are certain to cause confusion and error in the lower courts concerning the important issues presented by this Petition—justify the grant of certiorari to review the judgment below.

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9. *Marcucci v. National Railroad Passenger Corp.*, 589 F. Supp. 725, 728-29 n.5 (N.D. Ill. 1984); *Arrendondo v. Laredo Municipal Transit System*, 581 F. Supp. 868, 871 (S.D. Tex. 1984); *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F. Supp. 1344, 1349 (E.D. Va. 1983); *Cohen v. President and Fellows of Harvard College*, 568 F. Supp. 658, 661 (D. Mass. 1983); *Thompson v. Community Action of Greater Wilmington*, 567 F. Supp. 1159, 1164 (D. Del. 1983); *Watkins v. Reed*, 557 F. Supp. 278, 282 (E.D. Ky. 1983), *aff'd*, 734 F.2d 17 (6th Cir. 1984).

CONCLUSION

For the foregoing reasons, the decision below, that state action may be based on a finding of a symbiotic relationship, even though the State did not coerce, encourage, participate in, or receive a financial benefit from, the challenged personnel acts of Petitioners, is in direct conflict with the decisions of this Court, as well as other Courts of Appeals and district courts. Therefore, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 83-5471, 84-1077.

Harry T. KRYNICKY, Jr., *Appellant,*

v.

UNIVERSITY OF PITTSBURGH, Wesley W. Posvar, Paul N. Robinson, Rhoten A. Smith, Donald N. Henderson, Robert Nossen, *Appellees.*

Rosemary SCHIER, *Appellee,*

v.

TEMPLE UNIVERSITY, *Appellant.*

Argued April 23, 1984

Decided Aug. 23, 1984

Michael P. Malakoff, Ellen M. Doyle (argued), Berger, Kapetan, Malakoff & Meyers, Pittsburgh, Pa., for appellant Harry T. Krynicky, Jr., No. 83-5471.

James J. Restivo, Jr. (argued), Michael J. Betts, Reed, Smith, Shaw & McClay, Ronald F. Talarico, University of Pittsburgh, Counsel's Office, Pittsburgh, Pa., for appellees, No. 83-5471.

Robert J. Reinstein, Eleanor W. Myers, Temple University, Philadelphia, Pa., amicus curiae, Temple University, No. 83-5471 and for appellant, No. 84-1077.

Marcy D. Colins (argued), Philadelphia, Pa., for appellee Rosemary Schier, No. 84-1077.

Before ADAMS and BECKER, Circuit Judges, and SAROKIN, District Judge.*

OPINION OF THE COURT

BECKER, Circuit Judge.

These consolidated appeals present the question whether the recent Supreme Court decisions in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); and *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), in effect overruled this court's decision in *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir.1977) *(in banc)*, which held that the University of Pittsburgh (and by implication Temple University) are "state actors" for purposes of 42 U.S.C. § 1983.

The district courts reached differing results. In *Krynicky* the district court concluded that the *Lugar* trilogy had undermined *Braden*, and held that, because the Commonwealth of Pennsylvania had not participated with the University of Pittsburgh in making the faculty tenure decision challenged by Krynicky, the University's decision was not subject to the constraints of the fourteenth amendment. In *Schier* the district court reached the opposite result, holding that *Braden* was still controlling, and that the Commonwealth had so far insinuated itself into the operation of Temple University that the institution was subject to the mandates of the fourteenth amendment in connection with Schier's claim of retaliatory discharge.

Because we believe that *Braden* has not been overruled by the *Lugar* trilogy, we reverse in *Krynicky* and affirm in *Schier*.

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*(Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, sitting by designation.)

I. Factual and Procedural History

A. Krynicky

Harry Krynicky, an Assistant Professor of English at the University of Pittsburgh, brought suit against the University and various administrative officials under 42 U.S.C. § 1983, alleging that he had a "property" and "liberty" interest in his employment contract within the meaning of the fourteenth amendment, and that the University infringed those interests when it failed to notify him in a timely fashion of its decision to deny him tenure. In addition, Krynicky alleged that the tenure process generally denied him due process, and that the decision to deny him tenure was made in retaliation for his outspoken criticism of the University administration and his unorthodox teaching methods.[1] The linchpin of Krynicky's claim for purposes of this appeal is that the University's actions were taken "under color of state law" within the meaning of § 1983 because of the relationship between the Commonwealth of Pennsylvania and the University.

The University and the individual defendants moved for summary judgment, but did not contest the existence of state action. The district court granted the motions in part. 560 F. Supp. 803.[2] Defendants then amended their

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1. Krynicky asserted several pendent state law claims along with his § 1983 claims. These included breach of contract, intentional interference with a contractual relationship, and intentional infliction of emotional distress.

2. With respect to the due process claims under § 1983, defendants asserted that the University had provided Krynicky with complete procedural due process prior to the challenged employment decisions and that, furthermore, as a matter of law, Krynicky had no "property or liberty" right in continued employment at the University. With respect to the first amendment claim under § 1983, they asserted that it was barred by the applicable statute of limitation. The

answer to assert that there was no state action as required by § 1983, and again moved for summary judgment. The district court thereupon granted the motion as to the remaining claims, stating that the reasoning of *Rendell-Baker* and *Blum* essentially superseded the Third Circuit's analysis in *Braden*, and that, therefore, *Braden* did not control. The court held that "the receipt of revenue from the state, membership of state nominees on the University's Board of Trustees, and statutory recognition that the University is part of the state's system of higher education are not sufficient to make the University's employment policies state decisions." *Krynicky v. University of Pittsburgh*, 563 F. Supp. 788, 789 (W.D.Pa.1983).

B. Schier

Rosemary Schier, who was an employee of Temple University Hospital from September 1979 through September 3, 1981, brought suit against the University alleging that during the course of her employment, she was discriminated against on grounds of her sex, and that her supervisor had sexually harassed her, had retaliated against her for having filed internal complaints, and had forced her to sign a resignation memorandum. Schier sought relief under 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

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district court granted the motion as to the due process claim but denied it as to the first amendment claim, stating that the cause of action was not time-barred.

With respect to the state-law claims, the defendants asserted that under University regulations, Krynicky had received notice within the specified time period and had failed to exhaust all internal University procedures and remedies before filing the suit. They also asserted that the emotional distress claims were time-barred. The district court granted the defendants' motion on these two claims.

At the close of discovery, Temple moved for summary judgment on all claims, asserting that the Title VII claim was time-barred and that Schier had not presented any facts to support her claim that Temple had acted under color of state law for the purposes of § 1983. The district court granted summary judgment on Schier's Title VII claim, but denied Temple's motion on the § 1983 claim, holding that, under the symbiotic relationship test for state action articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the state had a sufficiently close relationship with Temple that actions taken by Temple were subject to constitutional scrutiny under section 1983. In reaching its decision, the district court considered the applicability of the *Lugar* trilogy to its decision, but concluded that *Blum* and *Rendell-Baker* did not overrule *Burton*, and that, therefore, the Third Circuit's opinion in *Braden* was still good law. *Schier v. Temple University*, 576 F. Supp. 1569 at 1578 (E.D.Pa.1984). However, recognizing that another district court in the circuit had reached the opposite result in the *Krynicky* case, the court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the question "whether, for the purposes of 42 U.S.C. § 1983, acts performed by employees of a statutorily designated 'state-related' institution of higher education such as Temple University constitute 'state action.'" We agreed to hear the appeal.

II. Discussion

A. The State Action Requirement and the State Action Tests

The fifth and fourteenth amendments protect individuals only from governmental action. In order for Krynicky or Schier to benefit from these constitutional

protections, they must show that the alleged violations of due process and freedom of speech are "fairly attributable to the state." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). The "state action requirement" preserves "individual freedom by limiting the reach of federal law and federal judicial power" and avoids "imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936, 102 S.Ct. at 2754.

The requirement of section 1983 that the challenged activity be taken "under color of state law"[3] has been treated as identical to the "state action" element of the fourteenth amendment. *Lugar*, 457 U.S. at 929, 102 S.Ct. at 2750; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 n. 7, 90 S.Ct 1598, 1606 n. 7, 26 L.Ed.2d 142 (1970). What constitutes sufficient state participation to attribute activity to the state under section 1983 has proved to be an extremely difficult question. It has variously been characterized as "murky waters," *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 591 (3d Cir.1979), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 814 (1980); "obdurate," *Braden v. University of Pittsburgh*, 552 F.2d 948, 955 (3d Cir.1977); and a "protean concept," *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328, 1331 (3d Cir.1975) quoting Lewis, "The Meaning of State Action," 60 Colum. L. Rev. 1083, 1085 (1960).

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3. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court to date has not developed a uniform test for ascertaining when state action exists and has stated that no such unitary test is possible. *Reitman v. Mulkey*, 387 U.S. 369, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830 (1967). Instead, the Court has adopted a number of approaches whose application depends upon the circumstances. The Court has suggested that lower courts investigate carefully the facts of each case. *Burton*, 365 U.S. at 722, 81 S.Ct. at 860. Two of the approaches are relevant to these appeals: the "symbiotic relationship" test and the "nexus" test.[4]

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the Supreme Court found state action where there was a "symbiotic relationship" between the acting party and the state.[5] The Court held that state action exists when:

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4. The other tests are the "public function" test and the "state compulsion" test. "Public function" analysis has been applied in three different situations: first, when the government, after performing a particular function, attempts to avoid its constitutional obligations by transferring the function to a private entity, *see Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); second, in cases involving the exercise of powers, such as the supervision of elections that are almost always carried out by government, *see Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); and third, in the first amendment context to determine if private property is the functional equivalent of a municipality. *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). The "state compulsion" analysis has been used in cases where the state, by its law, has compelled a particular act, *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170, 90 S.Ct. 1598, 1615, 26 L.Ed.2d 142 (1970); *Peterson v. City of Greenville*, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963).

5. In *Burton*, plaintiffs brought suit under 42 U.S.C. § 1983, alleging that the Wilmington Parking Authority, a state entity, was responsible for the racially discriminatory practices of a privately owned coffee shop located in a building owned by the authority. In the lease between the coffee shop and the Authority, the shop had agreed

> The State has so far insinuated itself into a position of interdependence with . . . [the acting party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id. at 725, 81 S.Ct. at 862. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), the Court held that state action may also exist when the state becomes sufficiently involved in the particular challenged activity.[6] The Court suggested that in considering the state action issue, the "inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453.

In *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977), we confronted the question whether the University of Pittsburgh acted under the color of state law with respect to a claim almost identical to that of Ms. Schier. We rejected Pitt's contention that *Jackson* had overruled *Burton*, stating:

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to abide by all applicable laws, statutes, ordinances, rules, and regulations of any federal, state, or municipal authority. The Authority, in turn, agreed to provide all maintenance and upkeep of the premises and to make any necessary structural or exterior repairs.

6. *Jackson* concerned a privately owned and operated utility. The plaintiff, a customer, alleged a violation of due process when the utility terminated her electric service without notice, a hearing, or any opportunity to pay the past due amounts. In the particular case, the Supreme Court held that the Commonwealth of Pennsylvania was not sufficiently involved in the particular challenged activity to convert it into state action.

> Based on a review of the Supreme Court's opinion in *Jackson*, we believe that that decision would not preclude application of the precepts of *Burton* here, *should the appropriate state-private relationship exist.* Instead of overruling *Burton*, the *Jackson* Court merely distinguished the earlier opinion, finding "absent in [Jackson] the symbiotic relationship presented in *Burton*..."

Braden, 552 F.2d at 957, citing *Jackson*, 419 U.S. at 357, 95 S.Ct. at 456. Based on the provisions of University of Pittsburgh-Commonwealth Act, Pa.Stat.Ann. tit. 24, §§ 2510-201 to 211, we concluded that Pennsylvania had so far insinuated itself into a position of interdependence with the University of Pittsburgh that there was a symbiotic relationship between the two, and we therefore held that the actions of the University could fairly be attributed to the state for purposes of satisfying the state action requirement of section 1983.

Unless *Braden* has been overruled by the Supreme Court's recent *Lugar* trilogy, it is binding precedent for the proposition that the University of Pittsburgh and the Commonwealth of Pennsylvania are involved in a "symbiotic relationship,"[7] and therefore, that the actions of the University are actions taken under color of state law for purposes of section 1983. Moreover, since the Temple University-Commonwealth Act, which sets out the relationship between Temple and the State, is virtually identical to University of Pittsburgh-Commonwealth Act, which was the basis for our conclusion in *Braden* that Pitt and the Commonwealth have a symbiotic relationship, there can be no doubt that, if *Braden* has not been

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7. The statute analyzed in *Braden* continues in effect at this time.

overruled, it requires the conclusion that the actions of Temple, like Pitt, are actions taken under color of state law.

Pitt and Temple make two arguments in support of their contention that *Braden* has been overruled:

> (1) the *Lugar* trilogy overruled or, at a minimum, limited *Burton v. Wilmington Parking Authority* to its facts, and therefore *Braden*, which relies on *Burton*, is no longer good law; and
>
> (2) even if the symbiotic relationship test remains viable, the *Lugar* trilogy has clarified that test and, as a result, it is now clear that the Third Circuit in *Braden* misapplied *Burton* when it concluded that a symbiotic relationship existed between Pitt and the Commonwealth.

We consider these arguments in turn.

B. The Impact of the Lugar Trilogy on Burton[8]

In *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), teachers who were discharged from the New Perspectives School, a non-public school, because they had opposed school policies and threatened to form a union, brought suit under 42 U.S.C. § 1983, alleging violations of their constitutional rights under the first, fifth, and fourteenth amendments. The plaintiffs cited several factors that allegedly supported

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8. In *Community Medical Center v. Emergency Medical Services of Northeastern Pennsylvania, Inc.*, 712 F.2d 878 (3d Cir.1983), which was decided subsequent to the Lugar trilogy, we stated that *Rendell-Baker* and *Blum* treat *Jackson* and *Burton* as viable frameworks of analysis. However, inasmuch as this statement was arguably dictum because the challenged entity in *Community Medical Center* failed every test for state action, we must reach the question, fairly presented by the contentions of Pitt and Temple in this case, whether *Burton*, which undergirds Braden, is still a viable framework of analysis.

attribution of the New Perspectives School's actions to the state. First, the New Perspectives School, which specializes in dealing with students who have difficulty completing high school, receives nearly all its students from referrals by various city school committees or from a state drug rehabilitation program. Second, the referring school committee pays for the student's education; consequently, the school receives almost 100 percent of its funding from the state. Third, in order to receive the tuition funding, the school must comply with various regulations created by the State, including some general administrative guidelines on personnel policies such as the type of records that must be kept. *Rendell-Baker v. Kohn*, 457 U.S. at 833, 102 S.Ct. at 2767.

Despite the presence of these factors offered to support state action, the Supreme Court held that the actions of the New Perspectives School could not be attributed to the state under § 1983. In reaching this determination, the *Rendell-Baker* Court first applied the nexus test of *Jackson* and determined that the state had not "compelled or even influenced by any state regulation" the decision to fire the plaintiffs. *Rendell-Baker*, 457 U.S. at 841, 102 S.Ct. at 2771. The Court then considered the assertion that the New Perspectives School met the symbiotic relationship test as set forth in *Burton*:

> In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. *Burton*, [365 U.S.] at 723, 81 S.Ct., at 860. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the

> Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here.

Id. 457 at U.S. at 842-43, 102 S.Ct. at 2772. After finding that the New Perspectives School failed the "public function" test as well, *id.* at 842, the Court held that there was no state action, and consequently that no claim for relief under 42 U.S.C. section 1983 was stated.

Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), also involved a suit under section 1983. The plaintiffs alleged violations of due process in the decision of a "Utility Review Committee" of The American Nursing Home in New York City to transfer Medicaid patients from high-care to lowercare facilities pursuant to federal regulations. The Supreme Court once again utilized the nexus test and failed to find state action, stating that there was no evidence that the State had "exercised coercive power or . . . provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004, 102 S.Ct. at 2786. The Court then applied the *Burton* symbiotic relationship test. It rejected the contention that state licensing and funding converts private action into state action, stating:

> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Bur-*

> *ton.* That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

Id. at 1011 (citations omitted). Finding that the American Nursing Home also failed to perform a function "traditionally the exclusive prerogative of the State," *id.* at 1011, citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, 95 S.Ct. at 454, the Court again concluded that there was no state action.

Lugar v. Edmondson Oil Co., Inc., the final member of the trilogy, did not have occasion to discuss the *Burton* symbiotic relationship test, and, therefore, that case is not directly relevant to the present discussion. However, it is significant to note that the Court did cite *Burton* in a footnote in *Lugar* without giving any indication that it had been overruled. *See Lugar*, 457 U.S. at 938 n. 19, 102 S.Ct. at 2754 n. 19.

As is apparent from the preceding discussion, the Supreme Court in the *Lugar* trilogy clearly treated the symbiotic relationship test as a viable framework of analysis, but concluded that *Burton* was inapposite to the factual scenarios of those cases. The only indicia of state involvement in *Rendell-Baker* and *Blum* were financial assistance and routine state regulation. By comparison, in Burton the state was much more intertwined with the Eagle Coffee Shop: the shop was located in a state-owned building; the state maintained the facility and made all necessary repairs; and the coffee shop and the state conferred mutual benefits on each other because of their location. Thus, we reject Temple and Pitt's assertion that

Rendell-Baker and *Blum* eliminate the *Burton* symbiotic relationship test.

C. The Impact of the Lugar Trilogy on Braden

Alternatively, Pitt and Temple argue that *Blum* and *Rendell-Baker* preclude the finding of a symbiotic relationship unless it can be shown that the state benefits financially from the activities of the defendant. Such a financial relationship was present in the *Burton* case, but was not proved in *Braden*, and was not, the defendants contend, demonstrated here. Thus, the defendants argue that although *Burton* may still be good law after the *Lugar* trilogy, *Braden* has implicitly been overruled and we should find that there is no symbiotic relationship in the cases of Pitt and Temple.

It is true that the Supreme Court in *Blum* and *Rendell-Baker* focused on the financial relationship between the defendants and the State, but that was because the financial relationship was the only significant form of state influence over the defendants in those cases. The Court concluded that merely proving the existence of the limited type of financial relationship present in those cases was not sufficient to establish the requisite symbiotic relationship. By way of contrast, the Court in *Burton* emphasized the complete intermingling of state and private actions that were present in that case as grounds for its conclusion that a symbiotic relationship existed. The court referred to fact that the state-owned Parking Authority financially benefited from renting to the coffee shop, but the Court also emphasized that the coffee shop was located in a building owned and operated by the State. It is apparent from the opinion that this second factor is at least as important as the financial relationship.

The Commonwealth's interrelationship with Pitt and Temple in these cases is more closely analogous to the complete intermingling of state and private actors found in *Burton* than to the relatively minimal interrelationship between the State and the defendants in *Blum* and *Rendell-Baker.* An examination of the statutes that create and define the Commonwealth's relationship with Pitt and Temple demonstrates this fact. *Cf.* Pa.Stat.Ann. tit. 24, §§ 2510-1 to 11 (Temple University-Commonwealth Act), Pa.Stat.Ann. tit. 24, §§ 2510-201 to 211 (University of Pittsburgh-Commonwealth Act). Since the two statutes are virtually identical, we will refer specifically only to the University of Pittsburgh statute.

To begin with, the statute was enacted to save the Commonwealth the expense of creating an additional state college.[9] In addition, the statute changes the name

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9. As we stated in *Braden:*

> [P]rior to adoption of the Act, the University desparately needed a source of funds to maintain its operations. The situation was described by Pitt officials and trustees as grave. At the same time, the Commonwealth desired to satisfy the needs of the populace for expanded facilities for higher education. As the existing state educational institutions were insufficient to satisfy the public demand, and because the creation of new state universities would have been extremely expensive, the decision was made to incorporate established, but financially ailing private institutions in to the Commonwealth system of higher education. The state thus was able to satisfy the educational needs of its citizens at a cost considerably lower than would have been entailed by the creation of wholly *new* institutions. Concomitantly, Pitt was able to survive as an institution of higher education, even though it may have been forced to relinquish its traditional autonomy as a private facility.

Braden, 552 F.2d at 961 (footnotes omitted).

of the University of Pittsburgh to "The University of Pittsburgh—Of the Commonwealth System of Higher Education." Pa.Stat.Ann. tit. 24, § 2510-203 (Purdon 1966). Consonant with this linkage, the legislature declares it to be the purpose of the Act to extend the opportunities for higher education in the Commonwealth "by establishing University of Pittsburgh as an *instrumentality* of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education." Pa.Stat.Ann. tit. 24, § 2510-202 (Purdon 1966) (emphasis added). This same section also provides:

> That the Commonwealth of Pennsylvania recognizes University of Pittsburgh as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and University of Pittsburgh for the purpose of improving and strengthening higher education by designating University of Pittsburgh as a State-related university.

Pa.Stat.Ann. tit. 24, § 2510-202 (Purdon 1966).

The statute also furnishes the "nuts and bolts" of this linkage. It provides that one-third of the University's trustees are to be selected by the Commonwealth, Pa.Stat.Ann. tit. 24, § 2510-204(b) (Purdon 1966), and that the Governor of Pennsylvania, the Mayor of the City of Pittsburgh, and the Superintendent of the Department of Public Instruction are trustees ex officio.[10] Pa. Stat.Ann. tit. 24, § 2510-204(a) (Purdon 1966). The Act

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10. In the Temple statute, the Mayor of Philadelphia, rather than the Mayor of Pittsburgh, is an ex officio trustee. Pa.Stat,Ann. tit. 24, § 2510-4(a) (1965).

provides that the Commonwealth will make annual appropriations to the University, to be used as specified by the state, and that the appropriated funds must be kept in a specific account. Pa.Stat.Ann. tit. 4, § 2510-207 (1966).[11] The state may further set tuition and fee schedules for Pennsylvania students in the annual appropriation act, Pa.Stat.Ann, tit. 24, § 2510-206 (1966).

The Act also mandates that the University "file with the General Assembly and with the Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from both the Commonwealth Appropriation Account and other University accounts during the fiscal year." Pa.Stat.Ann. tit. 24, § 2510-207 (Purdon 1966). The statute entitles the University to benefit from all Commonwealth programs for capital development, Pa.Stat.Ann. tit. 24, § 2510-208 (Purdon 1968), and creates a state tax exemption for income derived from bonds issued by the University and loans secured by its mortgages. Pa.Stat.Ann. tit. 24, § 2510-209 (Purdon 1966). Finally, the Chancellor of the University must file annually a report of all University activities, "instructional, administrative and financial," with the Board of Trustees who "shall transmit [the report] to the Governor and to the members of the General Assembly." Pa.Stat.Ann. tit. 24, § 2510-210 (Purdon 1966).

The logic of *Rendell-Baker* and *Blum* is that state contributions to otherwise private entities, no matter how great those contributions may be, will not of them-

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11. For example, for the fiscal year July, 1982 through June, 1983, the General Assembly appropriated $78,235,000 to the University of Pittsburgh.

selves transform a private actor into a state actor. In the cases of Pitt and Temple, to the contrary, the issue is not whether the level of state contributions has reached a magic figure necessary to effect this transformation, but rather the affirmative state act of statutorily accepting responsibility for these institutions. This fact, above all, marks the difference between these two institutions and those discussed by the Supreme Court in *Rendell-Baker* and *Blum.*

In addition, unlike the school in *Rendell-Baker* and the nursing home in *Blum,* Temple and Pitt are not merely private contractors with the state. Not only do they receive present financial support, but also the state has committed itself to future financial aid and sets an annual appropriation policy and tuition rate. There is nothing to indicate that the state could not discontinue its support of the New Perspectives School or the American Nursing Home at any time by the simple means of not renewing their contracts. By contrast, it would require a legislative enactment to disentangle Temple and Pitt from the Commonwealth, and the idea that legislative appropriations to these institutions might be severely curtailed is unrealistic. *Cf.* Pa.Stat.Ann. tit. 24, § 2510(b). Furthermore, neither of the institutions in *Rendell-Baker* or *Blum* had to submit to state-sponsored audits or make yearly reports to the State Assembly. Finally, unlike the institutions in *Blum* and *Rendell-Baker,* one-third of the Trustees of Pitt and Temple are now appointed by the state. Temple and Pitt are not merely "private contractors performing services for the government," *Rendell-Baker,* 457 U.S. at 843, 102 S.Ct. at 2772; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact.

In sum, we see nothing in either *Blum* or *Rendell-Baker* that conflicts with *Braden* or its rationale, and, therefore, we conclude that the Supreme Court did not overrule our decision in *Braden.*[12]

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12. Temple and Pitt also argue that, under state law precedent, the state courts have declared them to be private entities despite their statutory relationship with the state. In support of this contention, they cite *Mooney v. Board of Trustees of Temple University of Commonwealth System of Higher Educ.*, 448 Pa. 424, 292 A.2d 395 (1972), a case decided five years before *Braden*, which held that the Temple University-Commonwealth Act did not convert Temple into a public agency for the purposes of the Pennsylvania Inspection and Copying Records Act. *Mooney*, however, is inapposite to this case. The *Mooney* court specifically stated that the statute in question did not "transform Temple into a state agency *for purposes of* the Inspection and Copying Records Act." *Mooney*, 448 Pa. at 434, 292 A.2d at 401 (emphasis added). Its determination, therefore, only governs cases involving that Act. More importantly, a state court construction of a state statute has no bearing on whether an entity that is connected with the state is a "state actor" for purposes of the fourteenth amendment and § 1983.

Temple also argues that this court recognized the authoritativeness of *Mooney* in *Philadelphia National Bank v. United States*, 666 F.2d 834 (3d Cir.1981), *cert. denied*, 457 U.S. 1105, 102 S.Ct. 2904, 73 L.Ed.2d 1314 (1982), where we held that Temple was not an "agency" of the Commonwealth for the purposes of § 103(a)(1) of the Internal Revenue Code, 26 U.S.C. § 103(a)(1) (1976). While it is true that we considered *Mooney* in our analysis, we specifically noted the distinction between what constitutes a "state agency" and what constitutes "state action":

> On the other hand, such cases as *Henderson v. Fisher*, 631 F.2d 1115 (3d Cir. 1980); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977); and *Isaacs v. Board of Trustees of Temple University—of the Commonwealth System of Higher Education*, 385 F. Supp. 473 (E.D.Pa.1974), which explore whether activities of state-related universities are "state action" within the ambit of 42 U.S.C. § 1983, are of little assistance here. In those cases, the issue was whether a sufficient symbiotic relationship existed between the school and the Commonwealth so that there was liability for civil rights violations.

Philadelphia National Bank, 666 F.2d at 839.

III. Conclusion

We hold that the Supreme Court's recent decisions in the so-called *Lugar* trilogy do not overrule either the Supreme Court's decision in *Burton v. Wilmington Parking Authority* or our opinion in *Braden v. University of Pittsburgh.* Therefore, we are bound by Third Circuit precedent to hold that a "symbiotic relationship" exists between the Commonwealth of Pennsylvania on the one hand and Pitt and Temple on the other. Actions taken by those two institutions are, therefore, actions taken under color of state law and are subject to scrutiny under section 1983. Consequently, we will reverse the judgment of the district court in *Krynicky v. University of Pittsburgh* and affirm the judgment of the district court in *Schier v. Temple University,* and will remand both cases for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5471, 84-1077.

Harry T. KRYNICKY, Jr., *Appellant,*

v.

UNIVERSITY OF PITTSBURGH, Wesley W. Posvar, Paul N. Robinson, Rhoten A. Smith, Donald N. Henderson, Robert Nossen, *Appellees.*

Rosemary SCHIER, *Appellee,*

v.

TEMPLE UNIVERSITY, *Appellant.*

Argued April 23, 1984
Decided Aug. 23, 1984

ORDER AMENDING OPINION

It is ordered that page 5 of the slip opinion in the above-captioned case be amended by adding the words "in the motion" at the end of the first sentence in the first full paragraph as follows:

> The University and the individual defendants moved for summary judgment, but did not contest the existence of state action in the motion.

BY THE COURT:

/s/ EDWARD R. BECKER
Circuit Judge

Dated: September 28, 1984

A True Copy:

Teste: *Clerk of the United States Court of Appeals for the Third Circuit*

APPENDIX B

Harry T. KRYNICKY, Jr., Plaintiff,
v.
UNIVERSITY OF PITTSBURGH,
Wesley W. Posvar, Paul N. Robinson,
Rhoten A. Smith, Robert Nossen, Defendants.

Civ. A. No. 81-263.

United States District Court,
W. D. Pennsylvania.

May 25, 1983.

David F. Megnin, Kittanning, Pa., Marcel L. Groen, Bensalem, Pa., for plaintiff.

James J. Restivo, Jr., Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for defendants.

OPINION

WEBER, District Judge.

Plaintiff's complaint alleges that his denial of tenure by the University of Pittsburgh was a violation of his civil and constitutional rights. In our order and opinion of April 5, 1983 we granted summary judgment to defendants on all claims except plaintiff's First Amendment claim under 42 U.S.C. § 1983. We failed to find this claim time-barred by the applicable statute of limitations. (560 F.Supp. 803).

The undisputed facts of the case are fully set forth in the foregoing opinion, and plaintiff does not contest the factual basis of defendants' present motion for summary

judgment. The court had suggested to the parties after the disposition of prior motions that the question of state involvement was critical to the plaintiff's cause of action.

This question was brought into sharp focus by decisions of the United States Supreme Court on June 25, 1982 in *Rendell-Baker v. Kohn*, __ U.S. __, 102 S.Ct. 2764, 73 L.Ed.2d 418; *Blum v. Yaretsky*, __ U.S. __, 102 S.Ct. 2777, 73 L.Ed.2d 534 and *Lugar v. Edmondson Oil Co., Inc.*, __ U.S. __, 102 S.Ct. 2744, 73 L.Ed.2d 482.

Rendell-Baker held that the school's receipt of state funds, the presence of many state regulations governing the school's operations, and even the performance of a public function of education, do not make the actions of the school state action. This is particularly true of the school's personnel policies, which were not shown to be dominated by the state.

Rendell-Baker is most apt with respect to the present action because the plaintiff there, as in the present case, asserted both state action and governmental infringement on a First Amendment right.

On the same day the Court in *Blum v. Yaretsky*, supra, held that the receipt of state funds as the source of almost all of the private institution's income, and the extensive state regulation of private nursing homes by the state, did not make administrative decisions regarding patient transfers "state action" subject to the due process strictures of the Fourteenth Amendment.

Similar related cases in the 1982 term come to the same conclusion: *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); *Lugar v. Edmundson Oil Co.*, __ U.S. __, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

The University of Pittsburgh has been before this court before with respect to its status as a state agency. In *Braden v. University of Pittsburgh*, 343 F.Supp. 836 (W.D.Pa. 1972) Judge Sorg found that the plaintiff had failed to establish the requisite state relationship, and granted the University's motion to dismiss. The Court of Appeals determined that this conclusion involved a fact finding process and remanded the case to the district court for such proceeding. 477 F.2d 1 (1973). On remand Judge Sorg examined the factual relationship in detail, and based on a "totality of circumstances" he found the action of the University to be "under color of state law, 392 F.Supp. 118, 126 (W.D.Pa. 1975). On return to the Court of Appeals, the conclusion was affirmed, 552 F.2d 948, 956 (3d Cir. 1977).

In 392 F.Supp. 118 and in 552 F.2d 956, the district court and the Court of Appeals found that the state had exercised no control over the specific personnel policies which were the source of the plaintiff's complaint.

The defendants in moving for summary judgment have supplied an affidavit to the effect that the personnel and tenure policies described in *Braden* are still in effect. The plaintiff does not dispute this fact.

We, therefore, find that the standards employed in the *Braden* case to determine state action are not the present controlling law. The facts of receipt of revenue from the state, membership of state nominees on the University's Board of Trustees, and statutory recognition that the University is part of the state's system of higher education, are not sufficient to make the University's employment policies state decisions. The effect of *Rendell-Baker* has already been noted by district courts in this circuit. " . . . the recent Supreme Court decision of *Rendell-Baker v. Kohn*, supra, has eliminated govern-

ment funding such as that found in Braden as a basis for state action." *Fischer v. Driscoll*, 546 F.Supp. 861, 865 (E.D.Pa. 1982, Broderick, J).

The defendants' motion will be granted.

APPENDIX C

Rosemary SCHIER

v.

TEMPLE UNIVERSITY

Civ. A. No. 82-3554.

United States District Court,
E.D. Pennsylvania.

Jan. 13, 1984.

Mary D. Colins, Thomas F. Gehret, Philadelphia, Pa., for plaintiff.

Eleanor W. Myers, Helen Pudlin, Philadelphia, Pa., for defendant.

BENCH OPINION*

LOUIS H. POLLAK, District Judge.

This is a case in which the plaintiff is suing Temple University for causes of action that sound in terms of sexual harassment leading to, according to plaintiff's allegations, her essentially coerced resignation from the staff of the Temple University Hospital. The complaint is based in the alternative on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which is a federal legislative proscription of gender discrimination in hiring or in the terms of employment, and on section 1983 of Title 42 of the United States Code.

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* The following is an edited copy of the transcript of a Bench Opinion delivered on December 8, 1983. This edited copy shall be regarded as the official Opinion.

Section 1983 prohibits deprivations of constitutional rights and provides for actions at law to vindicate such deprivations imposed under color of law. And it is plaintiff's submission that gender discrimination in hiring or in the terms of employment, including as here alleged, sexual harassment, is constitutionally proscribed as well as legislatively proscribed.

There is no contest by the defendants that the allegations state substantively viable claims provided that, with respect to Title VII, the claim was timely filed; and with respect to the 1983 claim, that Temple University and those who operate under its aegis can be said to be operating under color of law.

The defendants have moved for summary judgment because they take issue both with the timeliness of the Title VII claim and with the constitutional sufficiency of the 1983 claim in that it is directed against an entity, Temple University, which denies that it operates under color of state law.

A. Timeliness of the Title VII Complaint

We will consider first the timeliness of the Title VII claim. The question of timeliness stems from the fact that the filing by the plaintiff of her charge with the Equal Employment Opportunity Commission (EEOC), which is an obligatory predicate for bringing an action in a federal district court, was accomplished on the 299th day after the plaintiff's allegedly coerced departure from her employment at Temple University Hospital. A Title VII complaint must be filed within 180 days of the alleged violation in a state in which there is no state agency analogous to the EEOC which could consider a claim of this sort. In a state such as Pennsylvania where an appropriate state agency does exist, a complainant

may be allowed up to 300 days in which to file a complaint with the EEOC. This additional time is granted by the statute in order to allow a complainant to resolve the matter through state-created channels. 42 U.S.C. § 2000e-5(e).

There is now an accumulation of cases which make it plain that a filing with the *state* agency which occurs after the 240th day would be too late because under the complex relationship between the federal and state enforcement mechanisms, the state agency is to have 60 days in which to deal with a complaint prior to EEOC consideration. If the filing of the complaint with the state agency takes place on the 241st day, then the state agency's completion of the process could well lapse over beyond the 300th day. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980).

Per contra, where, as here, an appropriate state agency is available but the complainant does not file with the state agency, then under the Third Circuit's recent decision in *Kocian v. Getty Refining and Marketing Co.*, 707 F.2d 748 (1983), a complaint filed with the EEOC on the 299th day is out of time. The reason for the rule in the *Kocian* case is that it places complainants in states with appropriate state agencies who do not file a complaint with the state agency on a par with complainants in states without such an agency.

> The purpose behind the extended 300-day limitations period also supports Getty's position. In *Mohasco Corp. v. Silver*, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980) the Supreme Court stated
>
> > The [legislative] history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil

> at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated.
>
> *Id.* at 821, 100 S.Ct. at 2494. Here, the purpose in allowing the extended limitations period has not been served because the state agency had no opportunity to address Ms. Kocian's claim. To allow a Title VII litigant the benefit of the extended limitations period merely because she fortuitously works in a deferral state would ignore the plain language of the statute and its legislative purpose. 707 F.2d at 751.

Now, our plaintiff filed her EEOC complaint on the 299th day after the last alleged violation of Title VII so that she complied neither with the 240-day rule nor with the 180-day rule. Plaintiff's counsel acknowledges that this was an untimely filing. Therefore, the only issue before me relating to timeliness is whether the defendant is estopped from pleading the relevant statute of limitations by virtue of the doctrine of equitable tolling which is held to obtain with respect to Title VII actions under certain circumstances.

Equitable tolling, which our Court of Appeals has said must be meticulously monitored, is not a general *carte blanche* to allow complainants to file late. Equitable tolling comes into play in three principal, but not mutually exclusive, circumstances: 1) where there is a showing that the defendant has effectively misled the plaintiff in some active sense; 2) where the plaintiff has in "some extraordinary way" been precluded from asserting her or his rights; or 3) where the plaintiff made a timely submission but in the wrong forum. *Kocia*, 707 F.2d at 753.

Plaintiff's grounds for asserting this is a proper case for application of principles of equitable tolling are two-

fold: first, it is asserted that this record shows beyond a peradventure of a doubt that the plaintiff was misled by the defendant. Principal reliance here is on the plaintiff's assertion in her deposition that the defendant, through Mr. Miller, told her in the closing summer days of 1981, at the point when she was resigning from her position, that he would write a letter of recommendation for her, would rehire her and would keep his eyes open for other employment opportunities for her at the hospital.

Taking the plaintiff's assertion of what Mr. Miller said at its strongest, for the purposes of this motion, the proposition that the plaintiff was so misled by Mr. Miller's statements as to deter her from filing her charge with the EEOC during the next approximately six months (which would have brought her within the 180-day provision) is entirely unpersuasive.

There is no suggestion that Mr. Miller discussed with the plaintiff any legal claims she might have stemming from her resignation or her intent to vindicate such claims. Furthermore, there is no evidence that Mr. Miller directly discouraged her from pursuing those rights.

Other evidence submitted by plaintiff in response to this motion makes it clear that plaintiff was aware of how to file an EEOC complaint. She was aware of the importance of timely filing of the complaint since she had obtained information from the EEOC and had some knowledge of the process from her prior job in an employment office. Therefore, as in *Vuksta v. Bethlehem Steel Corp.*, 540 F.Supp. 1276 (E.D.Pa.1982), the statements allegedly made by defendant's agent are not sufficient to support the conclusion that equitable tolling applies here.

The contention that the plaintiff was prevented in "some extraordinary way" from timely assertion of her

rights seems to depend on plaintiff's claim that she received erroneous guidance from the EEOC itself. She asserts that she called the EEOC in September of 1981 to find out how to proceed, and they told her that they would send her a brochure, which they did. The brochure she received said under the section entitled "Filing a Charge": "[Y]ou must file an employment discrimination charge within 180 days of the alleged discriminatory act. Where there is a State or Local Fair Employment Practice Agency in your area, you have up to 240 days, and in some cases you may have up to 300 days to file your charge with EEOC, but you should check with the Commission."

It cannot be asserted that this language in the brochure was a model of clarity, but it is not, on its face, a total misrepresentation. The first injunction was to file within 180 days. The second was, if you are in a state with an appropriate agency, you have up to 240 days. Further, in some cases, you may have up to 300 days, but check with the Commission.

Plaintiff asserts that because she was puzzled by the information in the brochure, she did call somebody at the Commission and was told that she had up to 300 days in which to file and that, ultimately, when she did file on the 299th day, her filing was accepted. Plaintiff argues that her late filing was due to her reasonable reliance upon these statements and actions by the EEOC.

The Third Circuit has noted, when faced with similar arguments, "That equitable tolling is particularly appropriate in cases involving 'lay persons unfamiliar with the complexities of administrative procedures.' We have distinguished those cases, however, from cases such as this one involving Title VII litigants who are represented by counsel." *Kocian*, 707 F.2d at 755.

In the present action, if plaintiff had shown that she was a novice as to the problems involved in filing employment discrimination claims and had only the advice of the agency as to the appropriate time for filing the complaint, equitable tolling might be warranted. But the evidence shows only that the plaintiff possessed more than average knowledge about the operating of anti-discrimination laws since she had dealt with such issues when she worked at an employment office before working at Temple University Hospital. Furthermore, it is apparent, from plaintiff's deposition, that she had retained an attorney before she filed her EEOC charge. At what point that legal representation commenced, one cannot tell from the record. However, from the evidence marshalled by plaintiff it is hard to see that plaintiff has shouldered her burden of showing that she has been precluded by the information received from the EEOC from effectively vindicating her rights.

Accordingly, I conclude that the filing under Title VII claim was tardy and that there are no grounds for forgiveness, and defendant is entitled to summary judgment on the Title VII claim.

B. State Action

We turn now to the larger question which is presented by defendant's second ground for its motion for summary judgment. Defendant contends with respect to the § 1983 claim that Temple University is not an entity whose activity is under color of state law. Furthermore defendant argues that personnel decisions made with respect to this plaintiff are not decisions which were encouraged or coerced by the Commonwealth of Pennsylvania or from which the Commonwealth in any way benefited.

Now, the question of the status of Temple and cognate institutions for § 1983 purposes is not a new one in this circuit. The question of the status of the University of Pittsburgh came before the Court of Appeals in *Braden v. University of Pittsburgh*, 552 F.2d 948 (1977). There the district court had dismissed a § 1983 proceeding against the University of Pittsburgh in which the complainant was a member of the University of Pittsburgh faculty who alleged that the university had discriminated against her and others in employment. The Court of Appeals reversed and remanded that case to the district court for findings of fact on the relationship between the University of Pittsburgh and the Commonwealth. On remand, after development of an extended record, the district court denied defendants' motion to dismiss. The Court of Appeals, en banc, speaking through Judge Adams, affirmed the decision that the University of Pittsburgh was, for the purposes of the motion, an entity whose alleged discrimination constituted state action within the meaning of the relevant doctrine surrounding § 1983.

It was while that case was in process that the question of Temple's status arose in this Court before Judge Higginbotham. *Isaacs v. Board of Trustees of Temple University*, 385 F.Supp. 473 (E.D.Pa.1974). Instructed by the initial remand in *Braden* which occurred in 1973, Judge Higginbotham developed a substantial factual record with respect to Temple's status. Judge Higginbotham's comprehensive opinion surveys not only the relevant law but the array of facts which were adduced on the record dealing with the relationship between Temple and the Commonwealth.

Some reference to Judge Higginbotham's findings and conclusions I think would be useful here. Judge

Higginbotham traced how Temple, initially a private institution without any trace of formal connection with the Commonwealth, became, pursuant to 1965 legislation, Temple University—Commonwealth Act, Pa.Stat.Ann. Tit. 24, §§ 2510-1 to 2510-12 (Purdon Supp.1983), a so-called "state-related" university, a status quite similar to that of the University of Pittsburgh. The University of Pittsburgh, like Temple, had been a private institution. Both institutions ran into certain financial difficulties which apparently led both of them to welcome the courting of the Commonwealth.

From the Commonwealth's point of view, the recruiting of Temple, and, analogously, the University of Pittsburgh into what the legislature called "the Commonwealth system of higher education" was found to be in the public interest of the people of Pennsylvania. Pa.Stat.Ann.Tit. 24, § 2510-2 (Purdon Supp.1983). The legislature found "that the Commonwealth of Pennsylvania recognizes Temple University as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and Temple University for the purpose of improving and strengthening higher education by designating Temple University as a State-related university; therefore, it is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing Temple University as an instrumentality of the Commonwealth to serve as a state-related institution in the Commonwealth system of higher education." § 2510-2(7).

The term "state-related institution" is in no sense a term of art. It reflects a closer association with the Commonwealth than that enjoyed by a group of enterprises of

which the University of Pennsylvania is a significant example. Those "state-aided" institutions receive substantial infusions of state funds, but their structures have not been modified nor their operations subject to legislative regulation to the same degree as "state-related" institutions.

Further removed from the Commonwealth are institutions which have kept their academic gowns almost completely unsullied by contact with the Commonwealth. I think Swarthmore, Haverford and Bryn Mawr may be examples of that, although there has been no development of this on the record before me. Suffice it to say, there are certain institutions which do not receive formal appropriations of Commonwealth funds as a generalized mode of support, although they may be objects of particular grants or contractual relationships which are not relevant to the question here.

Closer to the core of the Commonwealth are at least two other sets of institutions. Penn State University, the details of whose structure and financial posture I am not familiar with is, as I understand it, closer to the total dominion of the Commonwealth than the University of Pittsburgh and Temple. Similarly, the state colleges are, in effect, as I understand it, under the close direction of the Secretary of Education.

Now, Temple pursuant to the 1965 legislation, had its charter amended to change the name of the institution to "Temple University of the Commonwealth System of Higher Education."

Its board of trustees was also restructured. There are now thirty-six voting members of the board pursuant to state legislation, plus three ex officio members of the board. The three ex officio members are the Mayor of the City of Philadelphia, the Governor, and the Superintend-

ent of Public Instruction. Four members of the board of trustees are appointed by the Governor with the advice and consent of two-thirds of the Senate; four are appointed by the President pro tempore of the Senate; and four by the Speaker of the House. The legislation does not provide the mode of selecting the other twenty-four members of the board of trustees but does specify their terms. In the trustees is vested "the entire management, control and conduct of the instructional, administrative and financial affairs of the university." § 2510-5.

The university, under the governing legislation, is obliged to "maintain such tuition and fee schedules for Pennsylvania resident and non-Pennsylvania resident fulltime students as are set forth annually in the act of the General Assembly which makes appropriations to Temple University." § 2510-6.

Furthermore, the legislation provides that the "benefits of all Commonwealth or Commonwealth authority programs for capital development and improvement shall be available to the university under terms and conditions comparable to those applicable to land grant institutions of higher learning and State colleges. In accordance with legislative appropriations made as provided by law, the Commonwealth may, by agreement with the board of trustees, acquire lands, erect and equip buildings, and provide facilities for the use of the university." § 2510-7. The reference to "land grant institutions" in § 2510-7, is a reference which, as I understand it, includes schools such as Penn State University.

The legislation also authorizes the board of trustees to issue bonds in the name of the university, and it is specified that those bonds "shall at all times be free from taxation within the Commonwealth of Pennsylvania." § 2510-9(c).

The president of the university is required annually to make a report on the affairs of the university to the trustees who are required to submit that report to the Governor and the General Assembly. § 2510-10.

The opinion in *Isaacs* describes the monies appropriated to Temple University from 1965 forward to 1972-3. Those sums rose from 23 percent to 33.7 percent of the university's operating income.

Judge Higginbotham reviewed these factors and many others in his opinion in *Isaacs* and looked at them through the prism of the Supreme Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In that case the Supreme Court held that the Wilmington Parking Authority, an agency of the City of Wilmington, hence, the State of Delaware, was constitutionally accountable for the racially discriminatory refusal of the Eagle Coffee Shop, which rented space from the Wilmington Parking Authority, to accept black patrons.

> Certainly the "activities, obligations and responsibilities" of the Commonwealth are many and varied in the instant case. It has incorporated Temple into its own system of higher education. It has renamed Temple. Through its elected officials, it appoints one-third of Temple's Board of Trustees. It sets fee and tuition schedules for Temple's students and appropriates millions of dollars to Temple to enable the institution to maintain those schedules. It has funded a sizable portion of Temple's present capital development and plans to fund an overwhelming share of the institution's projected capital development. Through an extensive audit, it holds Temple accountable for the expenditure of the funds it has appropriated to the institution. It enjoys a right of

review over Temple's budget generally. It has authorized Temple to issue tax-exempt bonds. Finally, it requires Temple's chief executive officer to file annual reports on all of the institutions affairs, "instructional, administrative and financial." In my judgment, the present record presents a picture of Commonwealth participation and involvement that is far more extensive than the "activities, obligations and responsibilities" of the parking authority that contributed to the result in *Burton*.

According to the Court, the unique relationship between the restaurant and the parking authority conferred on both, in addition to the normal consideration attendant upon any lessor-lessee relationship, "an incidental variety of mutual benefits." 365 U.S. at 724, 81 S.Ct. at 861. The great bulk of the mutual benefit in the instant case can scarcely be described as "incidental." They were clearly visualized by both parties beforehand and deliberately incorporated into the Act. Two major benefits accrue to the Commonwealth: through Temple, it is able to provide relatively inexpensive higher education for its residents in southeastern Pennsylvania, and, again through Temple, it is able to discharge that public responsibility at far less cost to itself than if it had to establish a similar institution on its own. 385 F.Supp. at 488-89.

Judge Higginbotham then discussed the benefits to Temple from its relationship to the Commonwealth and then said:

Justice Clark [in *Burton*] also noted "the obvious fact that the restaurant is operated as an integral part of a parking building devoted to a public parking service." An "obvious fact" in the instant

case is the operating of Temple, since the passage of the Act, as an "integral part" of a public system of educational institutions, the Commonwealth system of higher education, which performs an indisputable public service.

In view of these facts and circumstances—the "activities, obligations, and responsibilities" of the Commonwealth, the "benefits mutually conferred" on Temple and the Commonwealth by their relationship, and the "obvious fact" that Temple is an "integral part" of the Commonwealth system of higher education—I find that the *Burton* criteria for "state action" has been satisfied. 385 F.Supp. at 489.

Now, Judge Higginbotham's decision, which was not appealed and has not been disapproved by the Court of Appeals or the Supreme Court, would seem dispositive of the issue here. There is no suggestion that intervening circumstances in the last decade have reduced Temple's connection with or support from the Commonwealth. The only change during the intervening decade has been the evolution of state action doctrines in ways which have limited the authority of *Burton*.

The Third Circuit Court of Appeals has expressly recognized this as recently as July of this year when, in *Community Medical Center v. Emergency Medical Services of Northeastern Pennsylvania, Inc.*, 712 F.2d 878, Judge Adams said, "As Judge Garth noted in dissent in *Braden v. University of Pittsburgh*, 552 F.2d at 971-973, the recent authorities, while not repudiating the *Burton* and public function tests, have severely limited their applicability." 712 F.2d at 880.

Now, the recent authorities which Judge Adams in *Community Medical Center* found to be particularly important to current application of the *Burton* "symbiotic

relationship" test were those very recent decisions of the Supreme Court in *Blum v. Yaretsky*, which is 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). In both cases, the Supreme Court declined to find that actions taken by institutions which were almost totally supported by state funds and which were subject to some measure of state regulation, were actions which could be regarded as under color of state law for § 1983 purposes.

In *Blum v. Yaretsky*, what was in question were nursing home decisions to transfer and discharge patients. In *Rendell-Baker v. Kohn*, what was at issue were allegedly discriminatory discharges of certain teachers and vocational counselors.

In *Blum v. Yaretsky*, the institution which the Court found not to be engaged in "state action" was a nursing home which received 90% of its funding from the state and was subject to significant state regulation. In *Rendell-Baker v. Kohn*, a school for the assistance of maladjusted students was found not to be involved in state action although almost all of the students of the school had been referred by state authorities and the school survived primarily on state funding.

Now, there can be little question that those decisions distinguish *Burton* and do so explicitly. In *Blum v. Yaretsky*, Justice Rehnquist stated: "We are unable to agree that the state is responsible for the decisions challenged by respondents. As we have previously held, privately-owned enterprises providing services that the state would not necessarily provide even though they are extensively regulated do not fall within the ambit of *Burton.*" 102 S.Ct. at 2789.

In *Rendell-Baker,* Chief Justice Burger distinguished *Burton* on the facts. In *Burton,* the state profited financially from the discrimination while in *Rendell-Baker* it did not. "Here the school's fiscal relationship with the state is not different from that of many contractors performing services for the government. No symbiotic relationship such as exists in *Burton* exists here." 102 S.Ct. at 2772.

Now, if we contrast the institution involved in *Rendell-Baker v. Kohn* or the cognate "privately-owned enterprise" which Justice Rehnquist was discussing in *Blum v. Yaretsky* or, indeed, *Emergency Medical Services of Northeastern Pennsylvania,* the corporation considered by Judge Adams in *Community Medical Services v. Emergency Medical Services,* with Temple University, I suggest the analogies are attenuated. For example, the school in *Rendell-Baker* was described by the Chief Justice as follows: "Respondent Kohn is the Director of the New Perspective School, a nonprofit institution located on privately-owned property in Brookline, Massachusetts. The school was founded as a private institution and is operated by a board of directors, none of whom are public officials or are chosen by public officials." 102 S.Ct. at 2766.

Temple University, as structured by the Commonwealth Act of 1965, is not, as was the New Perspective School, "operated by a board of directors, none of whom are public officials or are chosen by public officials." Nor is Temple "located on privately-owned property." Temple is an institution which, as we have noted, is operated by a board, one-third of whose voting members are selected by the ranking public officials of the Commonwealth.

It is an institution which is heavily funded by the state although not to the degree that the school and the

nursing home dealt with in *Rendell-Baker* and *Blum v. Yaretsky* received state funds. To be precise, in addition to the figures adduced by Judge Higginbotham, there is the finding by the Court of Appeals in *Philadelphia National Bank v. United States*, 666 F.2d 834 (1981), that the state's annual appropriations rose from 50.6 to 62.7 percent of the unrestricted revenue of Temple University between 1966 and '71 to '72. 666 F.2d at 836.

Perhaps more important is that "[D]uring the same period, the General State Authority of Pennsylvania built nine structures for Temple. Land for five of these was acquired in part by condemnation, and in four instances the Authority received the land by conveyance from the University. By 1971, the General State Authority owned 40 percent of Temple's physical plant." *Id.* Those factors and the other links between the Commonwealth and Temple make it particularly hard to accept a characterization of Temple University as analogous to "contractors performing services for the government." *Rendell-Baker*, 102 S.Ct. at 2772. This is an institution which was quite properly classified by Judge Higginbotham in *Isaacs* as a "hybrid." Temple constitutes a merger of great assets initially accumulated in the private sector with great assets and ever more accumulating assets from the public sector, it operates under a governing body which has an extraordinary infusion of persons selected to exercise a special public responsibility by the Governor, the Speaker and the President Pro Tempore of the Senate. The public responsibility that I speak of is the responsibility identified by the legislature in the Commonwealth Act of 1965 of extending and strengthening the Commonwealth system of higher education by making Temple University an "integral part of that system."

Whatever the shrinkage may be of the authority of *Burton*, it is apparent to me today, as it was apparent to Judge Higginbotham when he decided *Isaacs*, that the relationship between Temple University and the Commonwealth of Pennsylvania more than satisfies the demands of *Burton* for a "symbiotic relationship" which brings mutual benefit to the private as well as the public partner. Indeed, I would agree with Judge Higginbotham that the case for finding that the activities of Temple University are activities which comprehend state action is far stronger than the case for finding that the decision made by the Eagle Coffee Shop to exclude certain customers constituted "state action." The case is far stronger for the reason that the purposes for which Temple is operated pursuant to the concordat between the University and the Commonwealth, which matured in the legislation of 1965, are public purposes. That is to say, these are purposes of higher education, as contrasted with the private entrepreneurial purpose of serving coffee and donuts of Eagle Coffee Shop.

To characterize the work of Temple University as public is not to say that Swarthmore or Haverford or the University of Pennsylvania are engaged in public activity within the reach of the Constitution because they, too, are engaged in higher education. It is to say that higher education, indeed education generally, is one of the public functions as well as one of the private functions which is central to the operation of a democratic society. It is a service and a set of horizons that characterize the United States as a whole and each of our states.

Pennsylvania, like other states, compels its citizens when they are young to be educated for a period of years, and then, like every other state, provides public opportunities to be educated which supplement the private

opportunities for higher education. These parallel educational systems have been in existence from the beginning of our nation. To characterize Temple University as engaged in public activity is to say that Temple, since the transformation of its structure by the legislation in 1965 and through the continuing appropriations of funds and addition of public structures, is engaged in the public activity of the state as the legislatively designated "instrumentality" of the Commonwealth of Pennsylvania.

What this means in my judgment is that Temple University meets the *Burton* standard of a mutually beneficial "symbiotic relationship." I make this determination despite the recognition that *Burton* is today, of more limited applicability than it once was. What remains of *Burton* is a definition of state action which aptly applies to the case of the special institution which is Temple—a hybrid of some remaining private authorities, shored up and financially supported and undergirded physically by the real estate and buildings of the Commonwealth in the carrying forward of what the legislature determined to be a public function of highest consequence.

I conclude, in short, that the actions of Temple University are actions under color of law pursuant to *Burton*. I also conclude that they are under color of law independently of *Burton*. That is to say, I conclude that Temple University is sufficiently infused with the power of the state so that, in constitutional terms, it is what the legislature of Pennsylvania described it to be in statutory terms—an "instrumentality" of the Commonwealth.

It makes no difference in this analysis that Temple has been determined not to be a "political subdivision of the Commonwealth" for federal tax purposes. *Philadelphia National Bank v. United States*, 667 F.2d 834 (3d Cir.1981). That decision dealt with a problem in interpre-

tation of federal tax legislation. Such legislation does not purport to define the status of Temple University for purposes of the "state action" requirement of 42 U.S.C. § 1983.

Indeed, the Court of Appeals was careful to make that point. Judge Weis said of *Isaacs* and *Braden*, that such cases "which explore whether activities of state-related universities are 'state action' within the ambit of 42 U.S.C. § 1983, are of little assistance here. In those cases, the issue was whether a sufficient symbiotic relationship existed between the school and the Commonwealth so that there was liability for civil rights violations." 666 F.2d at 839.

In the same way, the decision by a divided Pennsylvania Supreme Court in *Mooney v. Board of Trustees of Temple*, 448 Pa. 424, 292 A.2d 395 (1972), that Temple University was not a "state agency" within the meaning of the Inspection and Copying Records Act of Pennsylvania is also not remotely pertinent to the constitutional consideration here.

In reaching these conclusions, I reject the proposition put forward by defendants that if state action is to be found here, it must be state action which connects officials of the Commonwealth directly to the particular discrimination which is challenged. I reject that conclusion because it is my constitutional determination that Temple University is, for the purposes of § 1983, an "instrumentality" of the state as substantially as Pennsylvania State University and the state colleges. Thus, the entirety of the actions or nonactions of Temple University is constrained by the 14th Amendment.

Ultimately, I think the issue which we face today must be examined in the light of the critical constitutional purposes which are at stake. To determine that

Temple's status is similar to the status of the New Perspective School considered in *Rendell-Baker v. Kohn*, is to accept Temple's claim that it is not different from "many contractors performing services for the government." This would dilute the importance of the undertaking of the Pennsylvania legislature in 1965 and the almost two decades of history since then in which there has been a strong and increasing commitment to the use of this great university as a part of the "Commonwealth system of higher education." I think what is evident here is that the Commonwealth of Pennsylvania, through its Legislature, through its Governor, through the highest officers of the Legislature, through its funds, and through its commitment of property has deemed as a matter of continuing public policy that Temple is a projection of the Commonwealth. And to that extent, the work Temple does on behalf of the people of Pennsylvania is public work, and it is public work which is shored up and at the same time constrained by the Constitution of the United States.

Accordingly, I will deny the defendant's motion for summary judgment with respect to the § 1983 claim and grant summary judgment with respect to the Title VII claim. These actions will be reflected in a written Order.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 83-5471, 84-1077.

Harry T. KRYNICKY, Jr., *Appellant,*

v.

UNIVERSITY OF PITTSBURGH, Wesley W. Posvar, Paul N. Robinson, Rhoten A. Smith, Donald N. Henderson, Robert Nossen, *Appellees.*

Rosemary SCHIER, *Appellee,*

v.

TEMPLE UNIVERSITY, *Appellant.*

Argued April 23, 1984

Decided Aug. 23, 1984

JUDGMENT

These causes came on to be heard on the records from the United States District Courts for the Western and Eastern Districts of Pennsylvania and were argued by counsel April 23, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Western District Court, entered in W.D. Pa. Civ. No. 81-263 on May 25, 1983, and appealed here at No. 83-5471 be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. It is fur-

ther ordered and adjudged that the judgment of the Eastern District Court entered in E.D. Pa. Civ. No. 82-3554 on January 13, 1984, and appealed here at No. 84-1077, be, and the same is hereby affirmed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against appellees in No. 83-5471; costs taxed against appellant in No. 84-1077.

ATTEST

/s/ SALLY MRVOS
Clerk

August 23, 1984

Certified as a true copy and issued in lieu of a formal mandate on October 2, 1984, *As to No. 83-5471 Only.*

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 83-5471, 84-1077.

Harry T. KRYNICKY, Jr., *Appellant*,
v.
UNIVERSITY OF PITTSBURGH, Wesley W. Posvar, Paul N. Robinson, Rhoten A. Smith, Donald N. Henderson, Robert Nossen, *Appellees*.

Rosemary SCHIER, *Appellee*,
v.
TEMPLE UNIVERSITY, *Appellant*.

Argued April 23, 1984
Decided Aug. 23, 1984

SUR PETITION FOR REHEARING

Present: SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, BECKER, *Circuit Judges*, and SAROKIN, *District Judge**

The petition for rehearing filed by Appellees in No. 83-5471 and Appellant in No. 84-1077, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ EDWARD R. BECKER
Judge

Dated: September 24, 1984

*As to panel rehearing only.

APPENDIX F

TEMPLE UNIVERSITY—COMMONWEALTH ACT

§ 2510-1. *Short title*

This act shall be known and may be cited as the "Temple University—Commonwealth Act."

§ 2510-2. *Legislative findings; declaration of policy*

It is hereby determined and declared as a matter of legislative finding:

(1) That the Temple College of Philadelphia was created a corporation with perpetual existence under the laws of the Commonwealth of Pennsylvania under an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act to provide for the incorporation and regulation of certain corporations,"[1] approved the twenty-ninth day of April, 1874, and its supplements, and its charter approved by the Court of Common Pleas No. 1 for the County of Philadelphia, of March Term, 1888, No. 346, on the twelfth day of May, 1888;

(2) That the original Charter of Incorporation was amended in the Court of Common Pleas No. 1, for the County of Philadelphia on the eighth day of April, 1891 and on the twelfth day of December 1907;

(3) That the name of the Temple College of Philadelphia was changed to Temple University by amendment of the original Charter of Incorporation on the twelfth of December, 1907;

(4) That the original Charter of Incorporation was amended by merging and consolidating "The Samaritan Hospital" and "The Garretson Hospital" into and with

1. Section 1 et seq. of Title 15.

Temple University on the twenty-first day of January, 1910, and merging the "Pennsylvania School of Horiculture for Women" with Temple University on the sixteenth day of June, 1958;

(5) That the Northwestern General Hospital of Philadelphia was merged into Temple University on the twenty-seventh of February, 1964, and the Northern Dispensary of Philadelphia was merged into Temple University on the twenty-ninth of July, 1964;

(6) That Temple University owns and maintains land, buildings, and other facilities which are used, together with land and buildings owned by the Commonwealth of Pennsylvania, for higher education, which land, buildings, and other facilities are under the entire control and management of the board of trustees;

(7) That the Commonwealth of Pennsylvania recognizes Temple University as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and Temple University for the purpose of improving and strengthening higher education by designating Temple University as a State-related university;

Therefore, it is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing Temple University as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.

§ 2510-3. *Change of name*

The Charter of Temple University shall be amended by changing the name of Temple University to "Temple

University—Of The Commonwealth System of Higher Education," hereinafter referred to as "the University" and, as such, shall continue as a corporation for the same purposes as, and with all rights and privileges heretofore granted to, Temple University, unless hereinafter modified or changed.

§ 2510-4. *Board of trustees; composition; Commonwealth trustees; terms*

(a) The Board of Trustees of the University shall consist of thirty-six voting members, together with the Governor of the State, the Superintendent of the Department of Public Instruction, and the Mayor of the City of Philadelphia, all of whom shall be members of the board of trustees, ex officio. The elective and appointive members, except as hereinafter provided, shall serve for four year terms.

(b) Twelve of the trustees shall be designated Commonwealth trustees and four shall be appointed by the Governor, with the advice and consent of two-thirds of all of the members of the Senate, four by the President pro tempore of the Senate, and four by the Speaker of the House of Representatives. Three appointments shall be made by each of the appointing authorities for a term of four years, three for a term of three years, three for a term of two years, and three for a term of one year commencing in October, 1965, and annually thereafter, three appointments shall be made by each of the three Commonwealth appointing authorities for a term of four years.

(c) Within six months after the effective date of this act the by-laws shall be amended to provide for twenty-four trustees, in addition to the twelve Commonwealth

trustees, and to establish a procedure whereby annually six of such trustees will be elected for four year terms.

§ 2510-5. *Powers and duties of board of trustees*

The entire management, control and conduct of the instructional, administrative, and financial affairs of the university is hereby vested in the board of trustees. The board may exercise all the powers and franchises of the university and make by-laws for their own government, as well as for the university.

§ 2510-6. *Public support, tuition*

The university shall maintain such tuition and fee schedules for Pennsylvania resident and non-Pennsylvania resident full-time students as are set forth annually in the act of the General Assembly which makes appropriations to Temple University: Provided, That the amounts appropriated by said act are sufficient for the maintenance of such schedules by the university: And, provided further, That for any given year, in the event the amounts appropriated are not sufficient for the maintenance of said tuition and fee schedules, the university shall have the right to alter said schedules to the extent necessary to provide required income equal to the amount not provided by the appropriation act.

§ 2510-7. *Capital improvements*

The benefits of all Commonwealth or Commonwealth authority programs for capital development and improvement shall be available to the university under terms and conditions comparable to those applicable to land grant institutions of higher learning and State colleges. In accordance with legislative appropriations made as provided by law, the Commonwealth may, by agreement with the board of trustees, acquire lands,

erect and equip buildings, and provide facilities for the use of the university.

§ 2510-8. *Appropriations*

(a) The sums appropriated by the Commonwealth shall be paid to the board of trustees only upon presentation by them of certified payrolls and vouchers showing expenditures in accordance with the appropriations. The Auditor General shall draw a warrant upon the State Treasurer for payment of approved expenditures. All expenditures made by the board of trustees in respect to such appropriations shall be subject to a post-audit by the Auditor General.

(b) For the purpose of assuring the proper accountability on the part of Temple University for the expenditure of the amounts appropriated by the Commonwealth, Temple University shall establish a Commonwealth Appropriation Account into which only the amounts appropriated by the Commonwealth shall be credited when received. Temple University shall apply the moneys in the Commonwealth Appropriation Account only for such purposes as are permitted in the act appropriating the same and shall at all times maintain proper records showing the application of such moneys. Not later than sixty days after the close of the fiscal year to which the specific appropriation relates, Temple University shall file with the General Assembly and with the Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from both the Commonwealth Appropriation Account and other university accounts during said fiscal year. Such statement of expenditures shall be reviewed by the Auditor General of the Commonwealth, and he shall have the right, in respect to the Commonwealth Appropriation Account, to audit and disallow expenditures

made for purposes not permitted by the appropriation act and to cause such sums to be recovered and paid by Temple University to the Treasurer of the Commonwealth. In respect to expenditures made by the university from acounts other than the Commonwealth Appropriation Account, the Auditor General shall have the right to review only and he shall file annually with the General Assembly such information concerning said expenditures as the General Assembly or any of its committees may require.

§ 2510-9. *Issuance of bonds tax exempt within the Commonwealth*

(a) The board of trustees may provide for the issuance of bonds in the name of the university for any proper purpose in the same manner as heretofore.

(b) The university shall have no power at any time or in any manner to pledge the credit or the taxing power of the Commonwealth of Pennsylvania or any political subdivision nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal of or interest on such obligations.

(c) Bonds issued by the university and loans secured by mortgages, their transfer and the income therefrom, (including any profits made on the sale thereof) shall at all times be free from taxation within the Commonwealth of Pennsylvania.

§ 2510-10. *Reports*

The President of the university shall each year, not later than the first day of October, make a report of all

the activities of the university, instructional, administrative and financial, for the preceding scholastic and fiscal year, to the board of trustees, who shall transmit the same to the Governor and to the members of the General Assembly.

§ 2510-11. *Exemption*

The act of March 15, 1899 (P.L. 8), entitled "An act to regulate the manner in which appropriations to educational, penal, reformatory, charitable, benevolent, or eleemosynary institutions shall be paid,"[2] shall not apply to any appropriation made in pursuance of this act.

§ 2510-12. *Effective date*

This act shall take effect July 1, 1965.

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2. Section 3482 of Title 72.

APPENDIX G

UNIVERSITY OF PITTSBURGH—COMMONWEALTH ACT

§ 2510-201. *Short title*

This act shall be known and may be cited as the "University of Pittsburgh—Commonwealth Act."

§ 2510-202. *Legislative findings: declaration of policy*

It is hereby determined and declared as a matter of legislative finding:

(1) That the University of Pittsburgh derives its corporate existence under the laws of the Commonwealth of Pennsylvania by reason of the act of the General Assembly of the Commonwealth establishing an "Academy or Public School in the town of Pittsburgh" on February 28, 1787, Volume XII, Pennsylvania Statutes at Large, page 357, and from the act of February 18, 1819 (P.L. 61) incorporating the "Western University of Pennsylvania";

(2) That the original Charter of Incorporation of the Western University of Pennsylvania was subsequently amended and supplemented by the following acts of the General Assembly: act of March 9, 1826, recorded in Laws of Pennsylvania (1825) (P.L. 74); act of February 9, 1855 (P.L. 24); and act of March 6, 1872 (P.L. 218);

(3) That the name of "Western University of Pennsylvania" was duly changed to "University of Pittsburgh" by order of the Court of Common Pleas of Allegheny County No. Four at 425 Third Term 1908 on July 11, 1908, the change of name being duly recorded in the Recorder's office of the County of Allegheny in Charter Book Volume No. 43, page 446 and;

(4) That the Charter of the University of Pittsburgh was duly amended in accordance with the authority granted by the act of May 5, 1933 (P.L. 289), article IV, section 403 as amended by amendments duly approved by the board of trustees on December 13, 1949 and March 8, 1960;[1]

(5) That the University of Pittsburgh owns and maintains land, buildings, and other facilities which are used, together with land and buildings owned by the Commonwealth of Pennsylvania, for higher education, which land, buildings and other facilities are under the entire control and management of the board of trustees;

(6) That the Commonwealth of Pennsylvania recognizes University of Pittsburgh as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and University of Pittsburgh for the purpose of improving and strengthening higher education by designating University of Pittsburgh as a State-related university.

Therefore, it is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing University of Pittsburgh as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.

§ 2510-203. *Change of name*

The Charter of University of Pittsburgh shall be amended by changing the name of University of Pittsburgh to "University of Pittsburgh—Of the Common-

1. Section 2851-403 of Title 15.

wealth System of Higher Education," hereinafter referred to as "the University" and, as such, shall continue as a corporation for the same purposes as, and with all rights and privileges heretofor granted to, University of Pittsburgh, unless hereinafter modified or changed.

§ 2510-204. *Board of trustees; composition; Commonwealth trustees; terms*

(a) The amended charter of the university as provided by section 3 of this act[2] shall also provide that the board of trustees of the university shall consist of thirty-six voting members, one of whom shall be the Chancellor of the University of Pittsburgh and the Governor of the State, the Superintendent of the Department of Public Instruction, and the Mayor of the City of Pittsburgh, all of whom shall be members of the board of trustees, ex officio.

(b) Twelve of the trustees shall be designated Commonwealth trustees and four shall be appointed by the Governor, with the advice and consent of two-thirds of all of the members of the Senate, four by the President Pro Tempore of the Senate, and four by the Speaker of the House of Representatives. One appointment shall be made by each of the appointing authorities for a term of four years, one for a term of three years, one for a term of two years, and one for a term of one year commencing with the date when the change in the charter of the university becomes effective. Annually thereafter, one appointment shall be made by each of the three Commonwealth appointing authorities for a term of four years.

(c) The twenty-four trustees, in addition to the twelve Commonwealth trustees, shall be elected annually

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2. Section 2510-203 of this title.

under such terms and conditions as may be provided by the university by-laws.

§ 2510-205. *Powers and duties of board of trustees*

The entire management, control and conduct of the instructional, administrative, and financial affairs of the university is hereby vested in the board of trustees. The board may exercise all the powers and franchises of the university and make by-laws for their own government, as well as for the university.

§ 2510-206. *State appropriations, tuition*

The annual appropriation act to the university for general maintenance may specify the purposes or areas for which such appropriations may be expended by the university. The annual appropriation act may also contain a tuition supplement requiring the university to maintain such tuition and fee schedules for Pennsylvania resident full-time students as set forth annually in such appropriation act: Provided, That the amounts appropriated by the act are sufficient for the maintenance of such schedules by the university: And, provided further, That for any given year, in the event the amounts appropriated are not sufficient for the maintenance of the tuition and fee schedules, the university shall have the right to alter the schedules to the extent necessary to provide required income equal to the amount not provided by the appropriation act.

§ 2510-207. *Payments of appropriations, accountability and auditing*

(a) The sums appropriated by the Commonwealth shall be paid to the board of trustees only upon presentation by them of certified payrolls and vouchers showing expenditures in accordance with the appropriations. The

Auditor General shall draw a warrant upon the State Treasurer for payment of approved expenditures. All expenditures made by the board of trustees in respect to such appropriations shall be subject to a post-audit by the Auditor General.

(b) For the purpose of assuring the proper accountability on the part of the University of Pittsburgh for the expenditure of the amounts appropriated by the Commonwealth, the University of Pittsburgh shall establish a Commonwealth Appropriation Account into which only the amounts appropriated by the Commonwealth shall be credited when received. The University of Pittsburgh shall apply the moneys in the Commonwealth Appropriation Account only for such purposes as are permitted in the act appropriating the same and shall at all times maintain proper records showing the application of such moneys. Not later than ninety days after the close of the fiscal year to which the specific appropriation[3] relates, the University of Pittsburgh shall file with the General Assembly and with the Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from both the Commonwealth Appropriation Account, and other university accounts during the fiscal year. Such statement of expenditures shall be reviewed by the Auditor General of the Commonwealth, and he shall have the right, in respect to the Commonwealth Appropriation Account, to audit and disallow expenditures made for purposes not permitted by the appropriation act and to cause such sums to be recovered and paid by the University of Pittsburgh to the Treasurer of the Commonwealth. In respect to expenditures made by the university from accounts other than the Commonwealth Appropriation

3. "appropriations" in original.

Account, the Auditor General shall have the right to review only and he shall file annually with the General Assembly such information concerning such expenditures as the General Assembly or any of its committee may require.

§ 2510-208. *Capital improvements*

The benefits of all Commonwealth or Commonwealth authority programs for capital development and improvement shall be available to the university under terms and conditions comparable to those applicable to land grant institutions of higher learning and State colleges. In accordance with legislative appropriations made as provided by law, the Commonwealth may, by agreement with the board of trustees, acquire lands, erect and equip buildings, and provide facilities for the use of the university: Provided, however, the university shall pay to the Department of Property and Supplies the same aggregate rentals as that department shall pay to the General State Authority for any dormitory authorized under the provisions of the act of January 21, 1966 (P.L. 1446).[4]

§ 2510-209. *Issuance of bonds tax exempt within the Commonwealth*

(a) The board of trustees may provide for the issuance of bonds in the name of the university for any proper purpose in the same manner as heretofore.

(b) The university shall have no power at any time or in any manner to pledge the credit or the taxing power of the Commonwealth of Pennsylvania or any political subdivision nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or

4. 71 P.S. § 1707.4.

of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal of or interest on such obligations.

(c) Bonds issued by the university and loans secured by mortgages, their transfer and the income therefrom, (including any profits made on the sale thereof) shall at all times be free from taxation within the Commonwealth of Pennsylvania.

§ 2510-210. *Reports*

The Chancellor of the university shall each year, not later than the first day of October, make a report of all the activities of the university, instructional, administrative and financial, for the preceding scholastic and fiscal year, to the board of trustees, who shall transmit the same to the Governor and to the members of the General Assembly.

§ 2510-211. *Exemption*

The act of March 15, 1899 (P.L. 8), entitled "An act to regulate the manner in which appropriations to educational, penal, reformatory, charitable, benevolent, or eleemosynary institutions shall be paid,"[5] shall not apply to any appropriation made in pursuance of this act.

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5. Section 3482 of Title 72.

No. 84-1017

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IN THE

Supreme Court of the United States

October Term, 1984

UNIVERSITY OF PITTSBURGH, WESLEY W. POSVAR, PAUL N. ROBINSON, RHOTEN A. SMITH, DONALD N. HENDERSON and ROBERT NOSSEN,

Petitioners,

vs.

HARRY T. KRYNICKY, JR.,

Respondent.

TEMPLE UNIVERSITY,

Petitioner,

vs.

ROSEMARY SCHIER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

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Statement of the Question Presented

Whether the Court Of Appeals For The Third Circuit correctly held that universities integrated by statute into the state's higher education system and designated as "instrumentalities" of the state are state actors within the meaning of 42 U.S.C. §1983 and the Fourteenth Amendment?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

Two of the Pennsylvania state-related universities, The University of Pittsburgh-Of the Commonwealth System of Higher Education ["Pitt"], and Temple University-Of the Commonwealth System of Higher Education ["Temple"] [hereafter "the Universities"], are seeking review of the decision of the Court of Appeals for the Third Circuit which held that, in light of Pennsylvania's statutory scheme which incorporated Pitt and Temple into the state system of higher education, the Universities are state actors for purposes of 42 U.S.C. §1983.[1] The Court of Appeals' opinion is reported in *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984).

The Universities erroneously argue that this case involves a finding of state action by two purely private institutions "which receive some state aid" (Petition pp. 1, 2) despite the clear statement by the Court of Appeals that the basis of its decision was not the substantial state aid which the Universities received[2] but rather the unusual total statutory intermingling of the state and the formerly private Universities. *Krynicky*, 742 F.2d at 101-103.

---

[1] Temple University-Commonwealth Act of November 30, 1965, P.L. 843, Pa. Stat. Ann. Tit. 24, §2510-2; University of Pittsburgh-Commonwealth Act of July 28, 1966, P.L. 87, Pa. Stat. Ann. Tit. 24, §2510-202. As the Court of Appeals in *Krynicky* noted these two statutes are "virtually identical", 742 F.2d at 99.

[2] For example, for the fiscal year July, 1982 through June, 1983, the General Assembly appropriated $78,235,000 to the University of Pittsburgh. 742 F.2d at 102.

The Temple University-Commonwealth Act in recognizing the University as "state-related" and in designating Temple as an "instrumentality" of the state provides:

> That the Commonwealth of Pennsylvania recognizes Temple University *as an integral part of a system of higher education in Pennsylvania*, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and Temple University for the purpose of improving and strengthening higher education by designating Temple University as a State-related university;
>
> Therefore, it is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing Temple University *as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.* (Emphasis added) Pa. Stat. Ann. Tit. 24, §2510-2.

The statutory language with respect to Pitt is identical, Pa. Stat. Ann. Tit. 24, §2510-202.

This Brief will address the reasons why under Rule 17 this Court should decline to review the Court of Appeals' application of well-settled law concerning the determination of state action in those institutions which are included within Pennsylvania's unique statutory scheme designating certain universities as "state-related" and state "instrumentalities".

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Applied Well Established Law To Determine The Existence Of "State Action".

The standard for determining the existence of "State action" has been established by this Court in a number of opinions and was properly applied by the Court of Appeals in this case.

That standard as set forth by the Universities in their Petition is as follows:

> "The 'ultimate issue' in determining whether state action exists is whether the alleged infringement of federal rights is 'jointly attributable to the State.' *Lugar*, 457 U.S. at 937" (Petition p. 10).

This is precisely the same legal standard applied by the Court of Appeals in its determination that the Universities were state actors for purposes of §1983:

> "The fifth and fourteenth amendments protect individuals only from governmental action. In order for Krynicky or Schier to benefit from these constitutional protections, they must show that the alleged violations of due process and freedom of speech are 'fairly attributable to the state.' *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982)." 742 F.2d at 97.

The Universities are simply dissatisfied with the Court of Appeals' application of this Court's prior state action decisions to the particular facts in this case.

Because this Court has consistently recognized the continuing viability of the symbiotic relationship test for state action established in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Universities without

any attempt to analyze *Burton* have stated that it has no "precedential value" to this case (Petition, p. 14, n. 7). With reference to the continuing viability of *Burton*, in *Lugar vs. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) this Court noted that in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), *Burton* was distinguished, 457 U.S. at 938, n. 19. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) this Court explicitly found no symbiotic relationship, *Id.* at 842 (1982). Finally, in *Blum v. Yaretsky*, 457 U.S. 991 (1982) this Court indicated that funding and regulation alone do not give rise to *Burton* liability. *Id.* at 1011. The holding and rationale of *Burton* therefore remains intact.

Petitioners also claim that the Court of Appeals "declined to acknowledge the impact of *Blum*, *Rendell-Baker* and *Polk County* [454 U.S. 312 (1981)] on its state action analysis" (Petition p. 14). To the contrary after consideration of the unusual statutory entwinement of the Commonwealth and the Universities, the Court of Appeals determined that the state action fact pattern most analogous to the facts presented was in *Burton*:

> "The Commonwealth's interrelationship with Pitt and Temple in these cases is more closely analogous to the complete interminging of state private actions found in *Burton* than to the relatively minimal interrelationship between the State and the defendants in *Blum* and *Rendell-Baker*." 742 F.2d at 101.

Thus, there is no conflict as alleged by the Universities, between the law as established by this Court and the law applied by the Court of Appeals.

B. The Court Of Appeals' Decision Presents No Conflict With Holdings Of Other Courts.

Contrary to the assertion of the Universities (Petition at pp. 7-8) the decision of the Court of Appeals for the Third Circuit is consistent with the decisions of other Courts of Appeals. There is no conflict on the actual issue presented here. The Universities' reliance on cases involving other universities, other statutory schemes, and private entities which are merely subsidized or regulated are misplaced. Those cases are clearly distinguishable on their facts from the state related university scheme reviewed by the Court of Appeals in this case.

1. Cases Involving Other Universities.

The decision below rested on the Court's careful analysis of the Pennsylvania statutory scheme for the State-related Universities. The Universities have not identified and the Plaintiff-Respondents are unaware of any similar state higher education system in the United States. The closest analogy may be the designation of a formerly private institution Rutgers University as the State University of New Jersey. See Rutgers, the state university law, 18 A:65-1 *et seq.*

All of the cases cited by the Universities in their Petition at p. 8 involved purely private institutions which were not incorporated into their states' higher education system by any statutory scheme. See *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Blouin v. Loyola University*, 506 F.2d 20 (5th Cir. 1975); *Murphy v. Villanova University*, 547 F.Supp. 512

(E.D.Pa. 1982), *aff'd*, 707 F.2d 1402 (3d Cir. 1983); *Gilinsky v. Columbia University*, 488 F.Supp. 1309 (1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981); *Greene v. Johns Hopkins University*, 469 F.Supp. 187 (D.Md. 1979); *Stewart v. New York University*, 430 F.Supp. 1305 (S.D.N.Y. 1976) and *Lorentzen v. Boston College*, 440 F.Supp. 464 (D.Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1981), *cert. denied*, 440 U.S. 924 (1979).

None of the above-listed private universities was state-related,[3] or had a special statutory relationship,[4] as here, to the state in which it was located.

The Universities are in error when they claim a conflict between the decisions in those cases and the decision of the Court of Appeals here because there is a substantial factual difference between purely private institutions which receive state funding or are merely incorporated under state law and state related universities which bear the name and imprimatur of state designated instrumentalities.

---

[3] Pennsylvania students at the state-related universities receive the benefit of reduced tuition and fees because the Commonwealth may set tuition and fee schedules for Pennsylvania students in the annual appropriation act, Pa. Stat. Ann. Tit. 24, §2510-6 and §2510-206.

[4] One third of the University's trustees are selected by the Commonwealth, Pa. Stat. Ann. Tit. 24, §2510-4(d) and §2510-204(b). The Chancellor of the University must file annually a report of all University activities "instructional, administrative and financial" with the Board of Trustees who are obligated to submit the report to the Governor and members of the General Assembly of Pennsylvania. Pa. Stat. Ann. Tit. 24, §2510-10 and §2510-210.

2. **Cases Involving Other Statutory Schemes.**

The decision of the Court of Appeals for the Third Circuit properly considered the specific statutory scheme before it and did not, as claimed by the Universities, "transform all the decisions of entities whose governmental relationship is set forth by statute into government action." (Petition p. 9). The decision of the Court of Appeals was limited to the facts before it and did not establish a legal principle which would render any entity created by statute as a state actor for purposes of §1983.

This Court has consistently recognized the fact based nature of the state action analysis to be applied by the lower courts. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) and *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982).

There is a clear *factual* difference between the Pennsylvania statutes which designated the Universities as "state-related" and as "instrumentalities" of the state, Pa. Stat. Ann. Tit. 24, §2510-2, §2510-202 and the federal statutory schemes cited by the Universities. The Universities are simply wrong when they rely on two federal statutory schemes which are completely unrelated to the *state* educational scheme considered by the Court of Appeals here and claim that applying the same rationale "federal action would be present in all decisions of the Communications Satellite Corporation or the National Rail Passenger Corporation." (Petition p. 9). The Communications Satellite System Act created:

> "a communications satellite corporation for profit which will not be an agency or establishment of the United States Government." Pub.L. 87-624, Title III, §301, Aug. 31, 1962, 76 Stat. 423.

Similarly in the National Rail Passenger Service Act, 1970, Congress created a "for profit corporation" which was expressly not "an agency or establishment of the United States, Pub.L. 95-421 §11, Oct. 5, 1978, 92 Stat. 928, Pub.L. 97-35, Title XI, §1188(a), Aug. 13, 1981, 95 Stat. 699.

The law to be applied to state statutory schemes has been established by decisions in this Court. The application of that law to different statutory schemes and in different factual settings obviously differs from case to case. Here the law of this Court was correctly applied. Moreover, the application of this Court's well settled legal principles to the plethora of different factual circumstances where state action is alleged is more appropriately the endeavor of a Court of Appeals.

3. Cases Discussing Whether The State Derived Profits From The Challenged Private Activity.

The Universities argue that three Courts of Appeals have limited the symbiotic relationship analysis set forth in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) to situations where the state financially benefitted from the challenged activity, *Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399, 402 (4th Cir. 1984) (private non-profit health services agency); *Gomez v. North Dakota Rural Development Corp.*, 704 F.2d 1056, 1059 (8th Cir. 1983) (private non-profit public services organization); and *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447, 451 (1st Cir. 1983) (private non-profit legal services corporation) (Petition p. 17). These cases merely follow *Blum v. Yaretsky*, 457 U.S. 991 (1982) and hold that government funding and regulation are not sufficient in

and of themselves to render the conduct of private entities state action. See, *e.g.*, *Gomez v. North Dakota Rural Development Corp.* where the Court stated:

> "[A]part from its interest in seeing that a federal grant is actually used for its intended purpose, the government has no vested interest in the success or even the continued existence of any particular community agency." *Id.* at 1059.

While it is the nature, quality and duration of the commitment undertaken by the state on behalf of the private entity rather than whether the undertaking is profitable or costly which determines whether their joint enterprise is subject to constitutional limitations, the Court of Appeals here did find that by designating the Universities as State-related, the Commonwealth actually spent less (*i.e.*, it profited from the relationship) than it would have spent had it constructed new schools:

> "As the existing state educational institutions were insufficient to satisfy the public demand, and because the creation of new state universities would have been extremely expensive, the decision was made to incorporate established, but financially ailing private institutions into the Commonwealth system of higher education. The state thus was able to satisfy the educational needs of its citizens at a cost considerably lower than would have been entailed by the creation of wholly new institutions." 742 F.2d at 101, n. 9.

Therefore, although profitability is not a prerequisite for a symbiotic relationship, it is apparent that the state here realized a financial benefit[5] from the incorporation of

[5] Besides requiring annual appropriations to the Universities, Pa. Stat. Ann. Tit. 24, §2510-7 and §2510-207, the statutes entitle the Universities to benefit from all Commonwealth programs for capital development, Pa. Stat. Ann. Tit. 24, §2510-8 and §2510-208 and create a state tax exemption for income derived from bonds issued by the Universities and loans secured by their mortgages, Pa. Stat. Ann. Tit. 24, §2510-9 and §2510-209.

the Universities into the State-related higher education system, just as in *Burton* the State and the Eagle Coffee Shop "conferred mutual benefits on each other because of their location." 742 F.2d at 101.

There is no conflict between the Court of Appeals here and other Courts of Appeals.

4. Cases Involving State Subsidy And Regulation.

The Universities claim a conflict between the Court of Appeals decision and the holdings in *Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306 (10th Cir. 1983) and *Arlosoroff v. National Collegiate Athletic Association*, 746 F.2d 1019 (4th Cir. 1984) (Petition p. 18). Both of those decisions stand for the proposition that subsidy and regulation do not make private conduct state action. That principle was also recognized by the Court of Appeals in this case when it stated:

> "Temple and Pitt are not merely 'private contractors performing services for the government,' *Rendell-Baker*, 457 U.S. at 843, 102 S.Ct. at 2772; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact." 742 F.2d at 103.

This Court has established legal standards for determining whether or not state action exists in a particular factual setting. The Court of Appeals for the Third Circuit articulated and applied this Court's legal standards consistent with the precedents in this Court and the decisions of the other Courts of Appeals.

Conclusion

For all of the reasons stated above certiorari should be denied.

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March 14, 1985

Certificate of Service

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